

# Enforcement of Real Mortgages by Executory Process

Patrick S. Ottinger

---

### Repository Citation

Patrick S. Ottinger, *Enforcement of Real Mortgages by Executory Process*, 51 La. L. Rev. (1990)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol51/iss1/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Enforcement of Real Mortgages by Executory Process

Patrick S. Ottinger\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	89
A. Nature of Mortgage .....	89
B. Modes of Enforcement .....	90
II. NATURE OF EXECUTORY PROCEEDINGS .....	92
A. General .....	92
B. Initiation of Executory Proceedings .....	94
1. Venue .....	94
2. Petition and Accompanying Exhibit .....	95
3. Authentic Evidence .....	96
a. General .....	96
b. Mortgage by Corporation .....	97
c. Mortgage by Partnership .....	98
d. Mortgage by Mandatary .....	98
e. Identity of Note .....	98
f. Transfer of Note .....	99
4. Evidence Which Need Not be Authentic .....	100
a. Article 2637(A)—Maturity of Indebtedness .....	100
b. Article 2637(B)—Advances by Mortgagee .	101
c. Article 2637(C)—Proof of Indebtedness ....	101
d. Article 2637(D)—Change of Name of Fi- nancial or Lending Institution .....	102
e. Article 2637(E)—Change of Name or Death .....	103
5. Issuance of Writ of Seizure and Sale .....	103
6. Seizure of Property .....	104
III. RIGHTS OF THIRD PERSONS INTERESTED IN PROPERTY ...	105
A. Introduction .....	105
B. Right to Request Notice of Seizure .....	106
C. Rights of Third Possessors .....	108
1. Right to Satisfy Underlying Indebtedness .....	109
2. Right to Arrest Seizure and Sale .....	109

---

Copyright 1990, by LOUISIANA LAW REVIEW.

\* Member, Louisiana and Texas Bars.

3. Right to Seek Enhanced Value .....	109
D. Federal Tax Liens .....	110
IV. MORTGAGES AFFECTING MINERAL LEASES .....	111
A. Introduction .....	111
B. Appointment of Keeper .....	111
C. Joint Operating Agreements .....	112
D. Oil and Gas Lien Statute .....	113
E. Notice to Commissioner of Conservation .....	114
V. JUDICIAL SALE .....	116
A. Legal Advertisement .....	116
B. Appraisement .....	117
1. Appraisal of Property .....	117
a. Notice to Appoint Appraisers .....	117
b. Appointment of Appraisers .....	117
c. Oath of Appraisers .....	118
d. Qualification of Appraisers .....	118
e. Minuteness of Appraisal .....	118
f. Filing of Appraisals and Compensation ....	121
2. Deficiency Judgment .....	121
a. General .....	121
b. Application to Sureties .....	124
c. Application to Private, Non-Judicial, Sales .....	126
3. Judicial Sale as Fraudulent Transfer .....	129
C. Judicial Sale .....	130
1. General .....	130
2. Injunction to Arrest Seizure and Sale .....	133
3. Grounds for Injunctive Relief .....	135
D. Compensation of Sheriff .....	136
E. Sheriff's Deed and Disposition of Proceeds .....	136
F. Action to Annul Judicial Sale .....	137
1. General .....	137
2. "Chilling" the Sale .....	138
G. Damages for Wrongful Seizure .....	138
VI. CONCLUSION .....	139

## I. INTRODUCTION

The law of Louisiana affords a mortgagee an expeditious means of enforcing a mortgage by provoking a sale of the mortgaged property in order to satisfy the indebtedness owed to the mortgagee. Due to the expedited nature of the proceedings, the courts have demanded strict adherence to the substantive and procedural requirements of law.

This article reviews Louisiana law relative to the enforcement of real mortgages by executory process and considers certain collateral issues.

*A. Nature of Mortgage*

"Mortgage" is defined in Louisiana Civil Code article 3278 as a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment.

Louisiana Civil Code article 3282 further states that the mortgage is a real right on the property bound for discharge of the obligation. It is in its nature indivisible and prevails over all the immovables subjected to it, and over each and every portion. It follows immovables into whatever hands they pass. The Louisiana Civil Code also provides that a mortgage is accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the execution.<sup>1</sup>

According to Article 3305 of the Code, a conventional mortgage can only be contracted by act passed in presence of a notary and two witnesses, or by act under private signature. This matter of form is very important in terms of the availability of the remedy of executory process. Unless the mortgage is in the form of an authentic act,<sup>2</sup> the mortgage can only be enforced by an ordinary lawsuit.

As noted above, a mortgage is an accessory obligation.<sup>3</sup> Its existence depends upon the existence of a principal debt for which the mortgage serves as security. If the principal debt fails or becomes unenforceable, the mortgage also fails.<sup>4</sup>

Three kinds of mortgages are contemplated by Louisiana law—conventional, legal, and judicial.<sup>5</sup> A mortgage also may be classified according to the object to which it relates. If immovable property such

---

1. La. Civ. Code art. 3284.

2. An authentic act is one executed in the presence of a Notary Public and two witnesses. La. Civ. Code art. 1833.

3. La. Civ. Code art. 3284; *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 17 So. 2d 264 (1944).

4. La. Civ. Code arts. 3285, 3411(4); *Lacoste v. Hickey*, 203 La. 794, 14 So. 2d 639 (1943).

5. La. Civ. Code arts. 3286, 3287.

as real estate or mineral leases is affected by the mortgage, it is a "real" mortgage. If, on the other hand, movable property is the object of the mortgage, it is a security agreement, formerly called a "chattel mortgage."<sup>6</sup> This article is concerned only with the conventional real mortgage.<sup>7</sup> Three types of conventional real mortgages are recognized under Louisiana law: (1) the special mortgage, wherein a mortgagor secures the payment of a specific existing debt;<sup>8</sup> (2) the mortgage to secure future advances, wherein the mortgagor creates a present mortgage to secure a debt to arise in the future;<sup>9</sup> and (3) the collateral mortgage, wherein the mortgagor executes a collateral mortgage note secured by the collateral mortgage, given in pledge as security for the payment of one or more debts represented by "hand notes."<sup>10</sup>

### *B. Modes of Enforcement*

Upon default of the principal obligation, the holder of the note representing that obligation has the remedy to enforce the conventional real mortgage by ordinary or, if appropriate or available, executory proceedings.<sup>11</sup> When default on a hand note secured by the pledge of a collateral mortgage note occurs, execution on the hand note requires using the collateral mortgage note by way of the pledge to enforce the collateral mortgage securing the hand note.<sup>12</sup>

When the mortgagee enforces a conventional real mortgage by an ordinary proceeding, the creditor must first obtain a judgment against the mortgagor and then execute the judgment.<sup>13</sup>

---

6. See La. R.S. 10:9-101 to -605 (Supp. 1990), which superseded La. R.S. 9:5351-5366 (1983 and Supp. 1990).

7. Nevertheless, since the procedure does not differ significantly depending upon the nature of the collateral, some chattel mortgage cases may be cited herein as authority for propositions for which no real mortgage cases have been reported.

8. La. Civ. Code arts. 3278, 3290; *Lacoste v. Hickey*, 203 La. 794, 14 So. 2d 639 (1943).

9. La. Civ. Code arts. 3292, 3293; *Hortman-Salmen Co. v. White*, 168 La. 1057, 123 So. 711 (1929).

10. La. Civ. Code art. 3158; *First Guar. Bank v. Alford*, 366 So. 2d 1299, 1302 (La. 1979) ("Unlike the other two forms of conventional mortgages, a collateral mortgage is not a 'pure' mortgage; rather, it is the result of judicial recognition that one can pledge a note secured by a mortgage and use this pledge to secure yet another debt."); *Thrift Funds Canal, Inc. v. Foy*, 261 La. 573, 579, 260 So. 2d 628, 630 (1972) ("A collateral mortgage is a mortgage designed, not to directly secure an existing debt, but to secure a mortgage note pledged as collateral security for a debt or a succession of debts."). See also *Nathan and Marshall, The Collateral Mortgage*, 33 La. L. Rev. 497 (1973).

11. La. Code Civ. P. art. 3721.

12. However, this technical statement is not dispositive of the procedural requirements of authentic proof which are discussed in Part II(B)(4).

13. La. Code Civ. P. art. 3722.

Executory proceedings are, therefore, the most expeditious means of enforcing a mortgage. This article focuses on the enforcement of the conventional real mortgage by executory proceeding. Louisiana Code of Civil Procedure article 2631 states that "[e]xecutory proceedings are those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law."

Due to the rather harsh nature of the remedy of executory process, Louisiana courts require strict compliance with all applicable requirements.<sup>14</sup> For instance, only a mortgage or privilege "evidenced by an authentic act importing a confession of judgment" can be enforced by means of executory proceedings.<sup>15</sup> Unless the appraisal requirements for executory proceedings are strictly followed, the foreclosure will be invalid and obtaining a deficiency judgment will be impossible. Parties must also comply with the requirement that the authentic act import a "confession of judgment." Louisiana Code of Civil Procedure article 2632 adds that an "act evidencing a mortgage or privilege imports a confession of judgment when the obligor therein acknowledges the obligation secured thereby, whether then existing or to arise thereafter, and confesses judgment thereon if the obligation is not paid at maturity."<sup>16</sup>

The importance which Louisiana courts attach to compliance with the requirements for executory process is seen in *First Federal Savings and Loan Association of Shreveport v. Bechtol*.<sup>17</sup> The mortgagor sold the affected property to a third person without the consent of the mortgagee and the mortgagee sought to enforce the mortgage by executory process. The court found that the confession of judgment contained in the mortgage document only constituted a confession of judgment in connection with a failure of the mortgagor to perform any of the obligations contained in the mortgage. Since the mortgage document did not contain a "due on sale clause," the mortgage likewise did not contain the requisite "confession of judgment" which would permit the use of executory process. The court stated further that the statutory

---

14. *Reed v. Meaux*, 292 So. 2d 557 (La. 1974); *First Guaranty Bank v. Ratcliff*, 424 So. 2d 289 (La. App. 1st Cir. 1982), writ denied, 432 So. 2d 265 (1983).

15. La. Civ. Code art. 1833; *Colonial Trust Co. v. St. John Lumber Co.*, 138 La. 1033, 71 So. 147 (1916).

16. Under the Louisiana Constitution of 1921, confessions of judgment for purposes of executory process were the only exception to the constitutional provision prohibiting such stipulations. La. Const. art. VII, § 44 (superseded 1974). While this general proscription was not incorporated in the Louisiana Constitution of 1974, it is contained in La. R.S. 9:3590 (1983).

17. 416 So. 2d 633 (La. App. 2d Cir.), writ denied, 421 So. 2d 908 (1982).

"due on sale" provision contained in Louisiana Revised Statutes 6:837 "does not of itself authorize executory process."<sup>18</sup>

## II. NATURE OF EXECUTORY PROCEEDINGS

### A. General

Executory process is a proceeding *in rem* and therefore does not seek a personal judgment against the debtor.<sup>19</sup> The mortgagee may secure a deficiency judgment only after a proper appraisal has been made. The parties need not be served with process in an executory proceeding.<sup>20</sup> The constitutionality of Louisiana's "executory process" procedure has been upheld.<sup>21</sup>

The following table illustrates the steps involved in an executory proceeding and the approximate time involved between filing the petition and the judicial sale:

<u>ACTION</u>	<u>APPROXIMATE ELAPSED DAYS FROM PETITION</u>	<u>AUTHORITY; REMARKS</u>
Petition	0	La. Code Civ. P. art. 2634
Appointment of Keeper	0	La. R.S. 9:5131 or 9:5136
Issuance of Demand for Payment	1	La. Code Civ. P. art. 2639; usually waived
Issuance of Notice of Seizure	1	La. Code Civ. P. art. 2721; not waiv- able
Recordation of Notice of Seizure	1	La. R.S. 13:3853

---

18. Id. at 636.

19. *First Guar. Bank*, 424 So. 2d 289 (La. App. 1st Cir. 1982), writ denied, 432 So. 2d 265 (1983); *Mack Trucks, Inc. v. Dixon*, 142 So. 2d 605 (La. App. 4th Cir. 1962).

20. La. Code Civ. P. art. 2640; *Brown v. Everding*, 357 So. 2d 1243 (La. App. 2d Cir. 1978).

21. *Ross v. Brown Title Corp.*, 356 F. Supp. 595 (E.D. La.), *aff'd mem.*, 412 U.S. 934, 93 S. Ct. 2788 (1973); *Hood Motor Company, Inc. v. Lawrence*, 320 So. 2d 111 (La. 1975); and *Buckner v. Carmack*, 272 So. 2d 326 (La. 1973), appeal dismissed, 417 U.S. 901, 94 S. Ct. 2594 (1974). See also *Bonner v. B-W Utilities, Inc.*, 452 F. Supp. 1295 (W.D. La. 1978) (discussed in part III(A)). Cf. *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972), wherein the Florida and Pennsylvania prejudgment replevin statutes were held unconstitutional.

Service of Demand for Payment on Defen- dant	2-3	La. Code Civ. P. art. 2640; usually waived
Service of Notice of Seizure on Defen- dant	3-4	La. Code Civ. P. art. 2721; not waiv- able
First Advertisement	7-8	La. R.S. 43:203(2)
Notice to Third Possessor	Before sale	<i>Bonner, infra</i> , at Part IIIA
Notice to Commis- sioner of Conservation (If Applicable)	30 days Before sale	La. R.S. 30:74(A)(3)
Notice to IRS (If Property Subject to Federal Tax Lien)	25 days Before sale	26 U.S.C.A. § 7425(b)
Sheriff Requests Mortgage Certificate	21 days Before sale	La. R.S. 13:3886B
Notice to Appoint Appraisers	25-29	La. R.S. 13:4363
Notice to Parties Who Requested Notice	10 days Before sale	La. R.S. 13:3886B
File Rule to Show Cause (Unreasonable Attorney's Fees)	10 days Before sale	La. Code Civ. P. art. 2753(c)
Second Advertise- ment	36-38	La. R.S. 43:203(2)
Filing of Report of Appraisers	38-40	La. R.S. 13:4363
Negotiate Sheriff's Commission	Before sale	La. R.S. 33:1428(A)(7)
Judicial Sale	43-45	La. Code Civ. P. art. 2334-2343; La. R.S. 13:4341

In recent times, because of the multitude of foreclosures, the above delays are probably more theoretical than real. The vast backlog of



foreclosures in certain metropolitan areas would certainly result in unfortunate, yet unavoidable, delays in bringing mortgaged property to a judicial sale. Apart from these delays, the periods reflected above are only estimations and may actually differ from parish to parish. Indeed, as stated above, many parishes have experienced a tremendous backlog in foreclosure sales resulting in extraordinary delays in the scheduling of such sales. Additionally, the estimated delays assume that the seizing creditor will encounter no difficulty in validly serving the debtor with the notice of seizure. Finally, certain of the above actions may not be applicable in every instance and may be disregarded in a given case.

## *B. Initiation of Executory Proceedings*

### *1. Venue*

An executory proceeding is initiated by filing, in a court of competent jurisdiction and proper venue, a petition complying with the requirements of Louisiana Code of Civil Procedure article 2634. Under Article 2633, venue is proper either in the parish where the property is situated or as provided under Louisiana's general rules of venue specified in Article 42 of the Code of Civil Procedure.<sup>22</sup>

Before 1984, it appeared that a non-Article 42 court could not entertain an action to enforce by executory process a mortgage against separate, non-continuous tracts in different parishes, although such a court could issue a writ of seizure and sale with respect to mortgaged property located in its parish. A common example of this type of foreclosure involves a mortgage affecting the mortgagor's oil, gas and mineral leases in numerous parishes.

Under Louisiana Code of Civil Procedure article 43, the "general rules of venue provided in Article 42 are subject to the exceptions provided in Articles 71 through 85." Prior to 1984, however, the exception contained in Article 80(1) did not apply because of the language, "except as otherwise provided in Articles 72 and 2633." The legislature in 1984 excluded this limiting reference to Article 2633, thereby rendering amended Article 80(A)(1) the applicable provision.<sup>23</sup> Moreover, paragraph B of this article provides that, if "the immovable property, consisting of one or more tracts, is situated in more than one parish, the action may be brought in any one of these parishes."<sup>24</sup> Louisiana Code of

---

22. See also La. R.S. 13:4111 (1968) which stipulates venue in an executory proceeding to enforce a mortgage affecting the "whole of a continuous tract of land situated partly in different parishes."

23. 1984 La. Acts No. 732.

24. *Oak Tree Sav. Bank v. Creighton Constr. Co., Ltd.*, 556 So. 2d 117 (La. App. 4th Cir. 1990).

Civil Procedure article 2633 was amended again in 1989 to exclude any resort to the venue exceptions contained in Articles 71 through 85 of the Code of Civil Procedure.<sup>25</sup>

Strict adherence to the requirements of executory process is required where venue is involved. In *Mack Trucks, Inc. v. Dixon*,<sup>26</sup> the court denied a deficiency judgment because the executory proceedings were filed and prosecuted in a court of incompetent jurisdiction.<sup>27</sup>

Parties should be careful when seeking enforcement of separate mortgages covering separate tracts of land in different parishes, executed by separate, distinct mortgagors whose mortgages secure the same underlying indebtedness. The same care is required whether the mortgage arrangement involves cross-collateralization<sup>28</sup> or the granting of separate security interests in separate collateral mortgage notes to secure a single hand note.

Prudent parties should ensure that the mortgage certificate in a given parish is prepared only in the name of the debtor whose property is located in that parish rather than in the names of other debtors who do not own property in that parish. Ensuring the certificate's exclusion of these debtors may be accomplished by making the appropriate allegations in the petition for executory process or by informing the clerk of court and the sheriff of the need to exclude those names. In this manner, one might avoid the situation where an unaware clerk of court prepares the mortgage certificate in the names of *all* debtors.

A clerk's preparing the certificate in the names of all debtors could be troublesome if the certificate includes the name of a debtor who does not own an interest in the property being foreclosed upon in that parish and against whom other apparently superior judgments or liens have been recorded. Even though such judgments or liens do not, in fact, affect the property situated in that parish, the seizing creditor might encounter difficulty persuading the sheriff on the morning of the judicial sale that such other judgments or liens may be disregarded.

## 2. *Petition and Accompanying Exhibits*

The petition for executory process must be accompanied by the authentic evidence necessary to prove the plaintiff's right to enforce the

---

25. 1989 La. Acts No. 117, § 1.

26. 142 So. 2d 605 (La. App. 4th Cir. 1962).

27. If executory process is unavailable for any reason and if enforcement of the mortgage is sought by an ordinary proceeding, then, under La. Code Civ. P. art. 72, the action may be brought in the parish where the property is situated and, unless the defendant timely objects to venue as being improper for a personal action, a personal judgment may also be rendered against him. If the defendant timely so objects, and if the objection is sustained, the "judgment shall be effective only against the property."

28. La. Civ. Code art. 3158(c).

mortgage through executory process.<sup>29</sup> Under Article 2635 of the Code of Civil Procedure, these exhibits shall include authentic evidence of the following:

- (1) The note, bond, or other instrument evidencing the obligation secured by the mortgage, security agreement, or privilege.
- (2) The authentic act of mortgage or privilege on immovable property importing a confession of judgment.

Article 2365 also provides that "[t]his requirement of authentic evidence is necessary only in those cases, and to the extent, provided by law."

### 3. *Authentic Evidence*

#### a. *General*

With regard to what constitutes authentic evidence for purposes of executory process, Louisiana Code of Civil Procedure article 2636 states:

The following documentary evidence shall be deemed to be authentic for purposes of executory process:

- (1) The note, bond, or other instrument evidencing the obligation secured by the mortgage, security agreement, or privilege, paraphed for identification with the act of mortgage or privilege by the notary or other officer before whom it is executed, . . . ;
- (2) A certified copy or a duplicate original of an authentic act;
- (3) A certified copy of any judgment, judicial letters, or order of court;
- (4) A copy of a resolution of the board of directors, or other governing board of a corporation, authorizing or ratifying the execution of a mortgage on its property, certified in accordance with the provisions of R.S. 13:4103;
- (5) A certified copy of the contract of partnership authorizing the execution of an act of mortgage filed for registry with the secretary of state; and
- (6) All other documentary evidence recognized by law as authentic.

A certified copy of a mortgage may be submitted and Louisiana Revised Statutes 13:4102(D)(2) sets forth a suggested form of certification that would be deemed authentic for purposes of executory process. The court in *Washington Bank & Trust Co. v. Hodge* adds that a mortgage is "not sufficiently certified for purposes of executory process" where the clerk's certificate merely attests to the fact of recordation in that office.<sup>30</sup>

---

29. La. Code Civ. P. arts. 2634, 2635.

30. 495 So. 2d 953 (La. App. 1st Cir. 1986). But see *Ford Motor Credit Co. v.*

*b. Mortgage by Corporation*

If the mortgagor is a corporation, Louisiana Revised Statutes 13:4103(A) states that, for purposes of executory process, authentic evidence of the authority of the officer or agent executing a mortgage on behalf of a corporation may be established by (1) a consent of shareholders as provided in Louisiana Revised Statutes 12:76; (2) an extract of the minutes of the board of directors, signed and certified by the corporate secretary or (3) a photocopy of the aforementioned minutes, certified either by the notary before whom the act was passed or by the clerk of the district court of the parish in which the mortgage and resolution has been recorded. As noted in Louisiana Code of Civil Procedure article 2636(4), the resolution must be certified and Louisiana Revised Statutes 13:4102(D)(2) sets forth the form of the certificate which should be used.

At least one case stands for the proposition that an unauthentic corporate resolution does not become authentic evidence by reason of its attachment to another document deemed authentic.<sup>31</sup> The original resolution, certified by the corporate secretary, is considered authentic evidence for purposes of executory process.<sup>32</sup> The fact that the resolution is on file in the public records, however, does not dispense with the requirement that the resolution be produced as part of the creditor's authentic evidence.<sup>33</sup> If the corporate resolution has been lost, an *ex parte* affidavit of the president of the corporation is not an acceptable substitute.<sup>34</sup>

An early case, *Interstate Trust & Banking Co. v. Powell Bros. Sanders Co.*, held that a corporate resolution to which the corporate seal was not affixed did not constitute authentic evidence for purposes of executory process.<sup>35</sup> The holding in *Interstate Trust*, however, is probably not viable under current law. Louisiana Revised Statutes 12:41B(1) which enumerates the powers enjoyed by Louisiana corporations specifically provides that the "failure to affix a seal shall not

---

Butler, 532 So. 2d 1178 (La. App. 1st Cir. 1988) (which recognized that Act No. 855 of the 1987 Legislature amended La. R.S. 13:4102(D) to provide that the clerk's certification "may include words such as 'certified copy,' 'true copy,' or any other words which reasonably indicate that the copy of the document is a certified copy, and the copy so certified shall be deemed authentic evidence.'").

31. *Fabacher v. Hammond Dairy Co.*, 389 So. 2d 87 (La. App. 4th Cir. 1980).

32. *Hibernia Nat'l Bank v. Con-Agg Equip. Leasing Corp.*, 478 So. 2d 976 (La. App. 5th Cir. 1985), writ denied, 481 So. 2d 1350 (1986).

33. *First Guar. Bank, Hammond, La. v. Baton Rouge Petroleum Center, Inc.*, 529 So. 2d 834 (La. 1988) (on reh'g).

34. *Bank of Leesville v. Wingate*, 123 La. 386, 48 So. 1005 (1909).

35. *Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co.*, 126 La. 22, 52 So. 179 (1910).

affect the validity of any instrument." Also, the appointment of a receiver or liquidator of a corporate defendant pursuant to Louisiana Revised Statutes 12:142, 143, or 151 does not affect the right of the mortgagee to enforce the mortgage by executory process.<sup>36</sup>

*c. Mortgage by Partnership*

If the mortgagor is a partnership, Louisiana Civil Code article 2814 provides that, unless the articles of partnership provide otherwise, "any person authorized to execute a mortgage on behalf of a partnership shall, for purposes of executory process, have authority to execute a confession of judgment in the act of mortgage or security agreement without execution of the articles of partnership by authentic act."<sup>37</sup> In *Elmwood Federal Savings and Loan Association v. M & C Partnership In Commendam*,<sup>38</sup> plaintiff contended that the relevant Code of Civil Procedure articles do "not directly *mandate* the filing" of evidence of the authority of a partner to execute a mortgage on behalf of a partnership. The court, noting that Louisiana Code of Civil Procedure article 2635(4) "gives a broad requirement of authentic evidence 'necessary to complete the proof of plaintiff's right to use executory process,'" stated that "evidence of the authority to mortgage partnership property is included in this requirement." The court concluded that "authentic evidence of *any* agent's authority to sign a mortgage note [is] 'necessary to complete the proof of plaintiff's right to use executory process.'"<sup>39</sup>

*d. Mortgage by Mandatary*

If the mortgagor is represented by an agent and attorney-in-fact, the authority of the agent to execute the mortgage on behalf of his principal must be established by authentic evidence.<sup>40</sup>

*e. Identity of Note*

Under Louisiana Code of Civil Procedure article 2636(1), the note "paraphed for identification with the act of mortgage or privilege by the notary or other officer before whom it is executed" must be presented and is considered authentic evidence.<sup>41</sup> This requirement has been strictly enforced in the courts. One court stated that a "variation in date on the paraph of the [collateral mortgage] note and the date on the act of collateral mortgage is a break in the chain of authentic

---

36. La. R.S. 13:4101 (Supp. 1990).

37. See also La. Code Civ. P. art. 2636(5).

38. 552 So. 2d 1217, 1219 (La. App. 5th Cir. 1989).

39. *Id.* at 1219.

40. *Crescent-City Bank v. Blanque*, 32 La. Ann. 264 (1880); *Pelican Homestead and Sav. Ass'n v. Winston*, 517 So. 2d 1220 (La. App. 4th Cir. 1987); and *General Fin. Co. of La., Inc. v. Evans*, 196 So. 581 (La. App. Orl. Cir. 1940).

41. "The paraph is the official signature [of the notary], and evidence of the reality

evidence."<sup>42</sup> In *Ricks v. Bernstein*,<sup>43</sup> a discrepancy existed between the note sued on and the note described in the authentic act of mortgage. Although the court conceded the probability of mistake or error in the note, the use of executory process required that "nothing can be left to conjecture."<sup>44</sup>

*f. Transfer of Note*

Louisiana Revised Statutes 10:3-202(1) provides:

Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer it is negotiated by delivery.

Consistent with this section from our Commercial Laws<sup>45</sup> is the rule that authentic evidence is not necessary where bearer paper is transferred, provided that the note originally began as bearer paper. Authentic evidence is, however, necessary under Louisiana Code of Civil Procedure article 2635(4) to establish a negotiation or transfer of order paper or a note which did not begin as bearer paper.

Furthermore, it is well settled in Louisiana jurisprudence that a promissory note payable to bearer and secured by a mortgage, may be transferred by mere delivery, and authentic evidence of the endorsement or transfer of the note is not necessary to enable the holder to foreclose by executory process.<sup>46</sup>

A seizing creditor must submit authentic evidence of the transfer or negotiation of order paper. The court in *American Security Bank of Ville Platte v. Deville*<sup>47</sup> said that "authentic evidence of the endorsement of a note payable to order is critical to the use of executory process" and held that:

[I]n order to use executory process on a note which is made payable to the order of a specific named payee, authentic evidence of the endorsement of the named payee is necessary.<sup>48</sup>

---

and genuineness of the note on which it is written." *Harz v. Gowland*, 126 La. 674, 678, 52 So. 986, 987 (1910).

42. *Bank of St. Charles v. Eris*, 477 So. 2d 847, 849 (La. App. 5th Cir. 1985). See also *United Mercantile Bank v. Schwartz*, 513 So. 2d 518 (La. App. 2d Cir. 1987).

43. 19 La. Ann. 141, 142 (1867).

44. See also *Kreher v. Theisman's Estate*, 125 La. 600, 51 So. 656 (1910).

45. La. R.S. 10:1-101 to -208 (1983 and Supp. 1990).

46. *First Nat'l Bank of Lafayette v. Gaddis*, 250 So. 2d 504, 510 (La. App. 3d Cir. 1971).

47. 368 So. 2d 167, 169 (La. App. 3d Cir. 1979).

48. *Id.* at 171. See also *Miller, Lyon & Co. v. Cappel*, 36 La. Ann. 264 (1884); *Colonial Financial Service, Inc. v. Stewart*, 481 So. 2d 186, 189 (La. App. 1st Cir. 1985) ("Authentic evidence of the assignment and endorsement of an order note, however, is required to support the use of executory process.").

As noted above, one of the elements of a "collateral mortgage package" is the pledge<sup>49</sup> of the collateral mortgage or "ne varietur" note as security for the hand note evidencing the actual indebtedness.<sup>50</sup> Since the "ne varietur" note is a bearer note which may be pledged by mere delivery,<sup>51</sup> the collateral pledge agreement "is not an integral part of the evidence in support of the executory proceeding."<sup>52</sup>

Louisiana Revised Statutes 9:4422 was enacted to clarify and codify certain court decisions regarding the requirements for negotiation of commercial paper as these requirements pertain to the authentic evidence necessary for executory process.

#### 4. Evidence Which Need Not be Authentic

Louisiana Code of Civil Procedure article 2637 specifies the evidence that need not be authentic for purposes of executory process.

##### a. Article 2637(A)—Maturity of Indebtedness

Where the promissory note requires giving notice as a prerequisite to acceleration of the entire debt, early cases held that authentic evidence of such notice was necessary for executory process.<sup>53</sup> Louisiana Code of Civil Procedure article 2637(A), however, was amended by the legislature in 1982 to provide that "evidence . . . of written notification of default . . . need not be submitted in authentic form." Rather, "[t]hese facts may be proved by the verified petition, or supplemental petition, or by affidavits submitted therewith."

In *The May Co. v. Heirs of Sumage*, the court found that the plaintiff failed to offer the requisite proof of his demand where the petition did not contain an "allegation that the obligation is in default and that it is due."<sup>54</sup> Another court<sup>55</sup> added a new dimension to the *May* decision. That court found that "the use of one specific and sacred phrase, or magic words like 'in default'" is unnecessary. Rather, "*proof* that a *breach* of the *condition maturing* the obligation" is required.

---

49. Since adoption of Chapter 9 of the Uniform Commercial Code effective January 1, 1990, the collateral mortgage note is now made the subject of a security agreement. La. R.S. 10:9-101 to -605 (Supp. 1990).

50. *Cameron Brown South, Inc. v. East Glen Oaks*, 341 So. 2d 450, 455-56 (La. App. 1st Cir. 1976).

51. La. Civ. Code art. 3158. See now La. R.S. 10:9-101 to -605 (Supp. 1990).

52. *Pontchartrain State Bank v. Gross*, 508 So. 2d 901, 903 (La. App. 5th Cir. 1987); see also *Plumbing Supply House, Inc. v. Century Nat'l Bank*, 440 So. 2d 173 (La. App. 4th Cir. 1983), writ denied, 444 So. 2d 1226 (1984).

53. *Fabacher v. Hammond Dairy Co.*, 389 So. 2d 87 (La. App. 4th Cir. 1980).

54. 347 So. 2d 916, 918 (La. App. 3d Cir. 1977).

55. *Pelican Homestead and Sav. Ass'n v. Kolb*, 524 So. 2d 276, 279 (La. App. 5th Cir.), writ denied, 531 So. 2d 477 (1988).

*b. Article 2637(B)—Advances by Mortgagee*

Mortgage instruments often permit a mortgagee to pay insurance premiums upon default of payment of such premiums by the mortgagor. The mortgagee may include as part of the secured indebtedness the amount of premiums paid by the mortgagee. Proof of such payment may be established by receipts or by affidavit.<sup>56</sup> This requirement has been simplified by Louisiana Code of Civil Procedure article 2637(B) which states:

If a mortgage sought to be enforced secures the repayment of any advances for the payment of taxes, insurance premiums, or special assessments on, or repairs to, or maintenance of, the property affected by the mortgage or security agreement, the existence, date, and amount of these advances may be proved by the verified petition, or supplemental petition, or by affidavits submitted therewith.

The mortgagee's evidence of having paid insurance premiums was deemed insufficient in *Mid-States Homes, Inc. v. Lertrge*.<sup>57</sup> Specifically, the court found that the mortgagee's allegation in its petition that the mortgage instrument provided the mortgagee with discretion to pay premiums on behalf of the mortgagor, did not meet the Article 2637 requirement that the "existence, date, and amount of the premiums may be proved by the filing of a verified petition, supplemental petition or affidavit."<sup>58</sup>

*c. Article 2637(C)—Proof of Indebtedness*

Louisiana Code of Civil Procedure article 2637(C) states that the existence of the actual indebtedness secured by a collateral mortgage "may be proved by the verified petition or supplemental petition, with the handnote, handnotes, or other evidence representing the actual indebtedness attached as an exhibit to the petition." Before the enactment of Article 2637(C), the reference in Code of Civil Procedure article 2636(1) to the "note . . . evidencing the obligation secured by the mortgage" meant the collateral mortgage note. The collateral mortgage note is the security pledged to secure another note, such as a handnote, rather than a representation of the indebtedness. In *Cameron Brown South, Inc. v. East Glen Oaks, Inc.*,<sup>59</sup> however, the court stated that,

---

56. *Germania Sav. Bank of New Orleans v. Lemley*, 50 La. Ann. 1289, 23 So. 874 (1898).

57. 367 So. 2d 1230 (La. App. 3d Cir. 1979).

58. *Id.* at 1232.

59. 341 So. 2d 450, 456 (La. App. 1st Cir. 1976).



"for the purposes of executory process, the collateral mortgage note is the 'instrument evidencing the obligation secured by the mortgage.'"

Louisiana Revised Statutes 6:334 provides that, in connection with foreclosure by executory process of a mortgage on immovable property in favor of a "supervised financial organization,"<sup>60</sup> "the certificate of any officer thereof, under the seal of the supervised financial organization, certifying as to the amount due on the mortgage, the interest rate as applicable, and the maturity thereof by reason of the failure of the mortgagor, his assigns, or successors to comply with the obligations imposed on him by the act of the mortgage is authentic evidence of the facts recited in the certificate."<sup>61</sup> According to one decision, "[t]he statute contemplates a certificate independently stating the amount due, the applicable interest rate, and the maturity of the note."<sup>62</sup> Also, "[t]his certificate should stand on its own in providing authentic evidence of the identity of the debtor and those specific facts, rather than conclusions, outlining the nature of the debt and its maturity."<sup>63</sup>

In *Moore v. Louisiana Bank & Trust Co.*,<sup>64</sup> a mortgagor contended that an executory process petition was legally deficient because it was not verified in accordance with Louisiana Revised Statutes 6:334. The court rejected this argument after a review of Louisiana Code of Civil Procedure articles 2635 and 2636, and Louisiana Revised Statutes 6:334, stating:

Reading these statutes together illustrates what is required for executory process and what is defined as authentic evidence. There is *no* requirement that a bank must file a certificate pursuant to La. R.S. 6:334. If the bank *does* comply with La. R.S. 6:334 that compliance is deemed authentic evidence by law as allowed in La. C.C.P. Art. 2636(6).<sup>65</sup>

*d. Article 2637(D)—Change of Name of Financial or Lending Institution*

Louisiana Code of Civil Procedure article 2637(D)<sup>66</sup> provides that "a name change, merger, purchase and assumption, or similar disposition

---

60. According to La. R.S. 9:3516(27) the term "supervised financial organization" includes state and national banks.

61. See Crawford, *Executory Process and Collateral Mortgages—Authentic Evidence of the Hand Note*, 33 La. L. Rev. 535 (1973); *Bank of Coushatta v. King*, 522 So. 2d 1328 (La. App. 2d Cir. 1988), rev'd on other grounds, 540 So. 2d 1020 (La. App. 2d Cir. 1989).

62. *Bank of Coushatta*, 522 So. 2d at 1334.

63. *Id.*

64. 528 So. 2d 606 (La. App. 2d Cir.), writ denied, 531 So. 2d 269 (1988).

65. *Id.* at 612.

66. This article was amended by 1989 La. Acts No. 161.

or acquisition, of a financial or lending institution may be proved by a verified petition or supplemental petition, or by an affidavit or affidavits submitted therewith by an appropriate officer of the successor entity." While this article provides the means for proving a name change, other statutes provide authority for the proposition that the change of a state or national banking association's name, including changes arising from a merger or consolidation, results by force of law, without the necessity of amending security documents.<sup>67</sup>

Prior to the enactment of Louisiana Revised Statutes 6:355(D), a change in the name of a corporate holder of a note had to be established by authentic evidence. In *Mellon Financial Services Corp. #7 v. Cass-reino*,<sup>68</sup> the mortgage note was issued in favor of Carruth Mortgage Corporation, but the executory process action was instituted by Mellon Financial Services Corporation #7. The court noted that Carruth had evidently changed its name to Mellon, although no authentic evidence was presented proving that Mellon was the proper party to institute the executory process.<sup>69</sup> Calling the lack of authentic evidence proving that Mellon was indeed the same party as Carruth a "serious flaw" in the executory process,<sup>70</sup> the court held that "the lack of authentic evidence to establish Mellon's right to proceed via executory process is a valid defense to a suit for a deficiency judgment brought [against the debtor]."<sup>71</sup>

*e. Article 2637(E)—Change of Name or Death*

Louisiana Code of Civil Procedure article 2637(E) allows a name change or the death of any party to be proved by verified petition, supplemental petition, or by affidavit submitted with the petition for executory process.

*5. Issuance of Writ of Seizure and Sale*

After the petition for executory process with the requisite supporting evidence has been filed and so determines that the plaintiff is entitled to it, the court orders the issuance of a writ of seizure and sale commanding the sheriff to seize and sell the property affected by the

---

67. See 12 U.S.C.A. § 31 (1986) (change of name of national banking association), § 215(e) (1986) (change of name resulting from the consolidation of a national or state bank with a national bank), § 215a(e) (1986) (change of name resulting from the merger of a national or state bank into a national bank), and La. R.S. 6:355(D) (1986) (change of name resulting from the merger or consolidation involving a state bank).

68. 499 So. 2d 1160 (La. App. 5th Cir. 1986).

69. *Id.* at 1161.

70. *Id.* at 1162.

71. *Id.* at 1163. See also *Gulf Federal Sav. Bank v. France*, 499 So. 2d 617 (La. App. 4th Cir. 1986), writ denied, 502 So. 2d 115 (1987).

mortgage or privilege.<sup>72</sup> Louisiana Code of Civil Procedure article 2639 requires the clerk to issue a demand upon the defendant for payment of the debt. In most mortgages, the demand for payment contemplated by Article 2639 is waived by the mortgagor. If this demand for payment is waived in the act of mortgage, the demand for payment need not be issued, and the clerk shall issue the writ of seizure and sale immediately.<sup>73</sup> If, however, this demand for payment has not been waived, before issuing the writ of seizure and sale the clerk must issue a demand upon the defendant for payment of the amount due and all costs of court. This demand must also notify the defendant that, in default of payment within three days of service, exclusive of holidays, a writ of seizure and sale will be issued, and the property described in the petition will be seized and sold according to law. Once the writ of seizure and sale is issued, the writ is transmitted to the sheriff who, upon receipt, immediately seizes the property affected by the mortgage.<sup>74</sup> The sheriff also serves upon the defendant a written notice of the seizure of the property. Although many mortgages purport to waive this notice, such waivers are ineffective according to the jurisprudence.<sup>75</sup>

#### 6. *Seizure of Property*

Under the provisions of Louisiana Revised Statutes 13:3851, a seizing creditor may direct the sheriff to "make a constructive seizure of any immovable property, whether vacant or improved." In order to invoke this provision, the seizing creditor must furnish the sheriff with "an exact and complete description of the immovable property to be seized." The expression "exact and complete description" as used in Louisiana Revised Statutes 13:3851 means only that the description must identify with certainty the property to be seized.<sup>76</sup> The sheriff is required to prepare a notice of seizure which must be served on the party or parties whose property is to be seized. Another copy of this notice must be

---

72. La. Code Civ. P. art. 2638.

73. La. Code Civ. P. art. 2639.

74. La. Code Civ. P. art. 2721.

75. See La. Code Civ. P. art. 2721 comment (b); *First Federal Sav. and Loan Ass'n v. Blake*, 465 So. 2d 914, 918 (La. App. 2d Cir.), writ denied, 469 So. 2d 984 (1985) ("Service under this article is mandatory and may not be waived."); *Hibernia Nat'l Bank in New Orleans v. Con-Agg Equip. Leasing Corp.*, 478 So. 2d 976 (La. App. 5th Cir. 1985), writ denied, 481 So. 2d 1350 (1986); *General Motors Acceptance Corp. v. Henderson*, 228 So. 2d 323 (La. App. 3d Cir. 1969); *Mack Trucks, Inc. v. Magee*, 141 So. 2d 85 (La. App. 1st Cir. 1962). The seizing creditor should endeavor to effect personal service on the debtor. *Federal National Mortgage Ass'n v. O'Donnell*, 446 So. 2d 395, 397 (La. App. 5th Cir. 1984) ("... it seems that personal service would be required for a meaningful notice in executory process.").

76. *Gretna Fin. Co. v. Camp*, 212 So. 2d 857 (La. App. 4th Cir. 1968).

filed for recordation in the mortgage records of the parish in which the affected property is situated.<sup>77</sup> Pursuant to Louisiana Revised Statutes 13:3855, the filing of this notice for recordation in the mortgage records "shall be considered the actual seizure and possession by the sheriff of the immovable property described; and it is not necessary for the sheriff to make an actual seizure or to take actual possession thereof, or to appoint a keeper therefor." Louisiana Revised Statutes 13:3860 recognizes that a constructive seizure under the provisions of Louisiana Revised Statutes 13:3851-61 provides an additional mode of seizing immovable property and that, at the option of the seizing creditor, the sheriff may be directed to effect an actual seizure of the immovable property.

Louisiana Code of Civil Procedure article 326 requires the sheriff to take actual possession of all movable property and allows him to take possession of immovable property seized. Also, the sheriff must safeguard, protect, and preserve all property seized. This article also authorizes the appointment of a keeper of the property. The mortgage document may provide for the appointment of a keeper of the property in the manner provided in the mortgage or by the court in the event of a mortgage's enforcement.<sup>78</sup> The statutes also provide for the manner of appointment and the powers, duties and compensation of the keeper.

The Louisiana Supreme Court has also spoken on the function of the "keeper of property" in executory proceedings. In *Pioneer Bank and Trust Company v. Oechsner*,<sup>79</sup> the court noted that a keeper appointed under this statute "functions in lieu of the sheriff who, upon seizure of the property, is otherwise entitled under La.Code Civ.P. art. 328 to 'continue the operation of any property under seizure, including a business.'"<sup>80</sup>

If the property to be seized is in the possession of a "third possessor," Louisiana Civil Code article 3408 provides that the fruits or income accruing to such property are "due by the third possessor, only from the time when the notification of the order of seizure was served on him."<sup>81</sup>

### III. RIGHTS OF THIRD PERSONS INTERESTED IN PROPERTY

#### A. Introduction

If the property subject to the mortgage has been transferred by the mortgagor to a third person, the mortgage may nevertheless be enforced

---

77. La. R.S. 13:3853 (1968).

78. La. R.S. 9:5136-:5138 (1983 and Supp. 1990).

79. 468 So. 2d 1164, 1169 (La. 1985).

80. Cf. La. R.S. 9:5131-:5140.1 (1983 and Supp. 1990), discussed *infra* Part IV(B).

81. See *Linn v. Dee*, 31 La. Ann. 217, 221 (1879).

and the property may be seized in the hands of the third person.<sup>82</sup> Most mortgages contain a pact *de non alienando* which authorizes the mortgagee to foreclose the mortgage against subsequent transferees in the same manner as though no divestiture of the mortgagor's title and ownership had ever occurred.<sup>83</sup> Louisiana Civil Code articles 3397 and 3399 grant such relief to creditors whose claims are secured by a mortgage on immovable property. Louisiana Code of Civil Procedure article 2701 also provides a statutory pact *de non alienando*. This article states that the "third person who then owns and is in possession of the property need not be made a party to the proceeding."

The courts, however, by incorporating the United States Constitution into their analysis, add a new gloss to the statutes. For instance, in *Bonner v. B-W Utilities, Inc.*,<sup>84</sup> the court held that the due process clause of the fourteenth amendment to the United States Constitution requires that notice to third persons be given before the property may be seized and sold pursuant to Louisiana's executory process scheme.<sup>85</sup> Accordingly, in order to assuage the objections raised by the *Bonner* court, actual notice, rather than mere constructive notice by publication, should be given to third possessors of the property sought to be seized and sold.

Since *Bonner* notices are most often given by mail, the letters and proof of receipt should be filed in the clerk of court's records in order to provide evidence that the notice requirement has been fulfilled. Also, instructing the sheriff to serve the petition and notice of seizure and sale upon some or all third persons to whom *Bonner* notices are due ensures that evidence of *Bonner* compliance is reflected in the record.

### *B. Right to Request Notice of Seizure*

Under Louisiana Revised Statutes 13:3886, any person who desires to be notified of the seizure of specific immovable property may file a request for such notice in the mortgage records of the parish where the immovable property is located. The request must identify the immovable property, the owner of that property, and the name and address of the party desiring notice. Also, the person requesting notice must pay the sheriff the sum of ten dollars.

After the seizure of property, and at least twenty-one days before the judicial sale, the sheriff must request that the clerk of court prepare

---

82. La. Code Civ. P. arts. 2701, 3741.

83. *Avegno v. Schmidt & Ziegler*, 35 La. Ann. 585 (1883), *aff'd*, 113 U.S. 293, 5 S. Ct. 487 (1885); *Lotz v. Iberville Bank and Trust Co.*, 176 La. 579, 146 So. 155 (1933).

84. 452 F. Supp. 1295 (W.D. La. 1978).

85. *Cf. Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706 (1983).

the mortgage certificate, which must be read at the sale.<sup>86</sup> If a request for notice has been properly filed with the clerk of court in the manner specified by Louisiana Revised Statutes 13:3886, such notice should be reflected on the mortgage certificate. The sheriff must notify any person so reflected on the mortgage certificate at least ten days prior to the sale. Although the statute specifies the manner of effecting such notice, Louisiana Revised Statutes 13:3886(D) adds that the "failure of the sheriff to notify a person requesting notice of seizure shall not affect the rights of the seizing creditor nor invalidate the sheriff's sale."

This scheme for effecting executory process has withstood constitutional challenge. In *Mid-State Homes, Inc. v. Portis*,<sup>87</sup> a federal court upheld the constitutionality of the Louisiana executory process scheme against an attack based upon the failure of the procedure to require notice to an inferior mortgagee as allegedly required by *Mennonite Board of Missions v. Adams*.<sup>88</sup> Relying on Louisiana Revised Statutes 13:3886, the court stated that "the Louisiana system which gives notice to inferior creditors—or anyone else for that matter—once they have identified themselves and paid a nominal fee passes constitutional muster."<sup>89</sup> However, in *Small Engine Shop, Inc. v. Cascio*, the Fifth Circuit held that "La.Rev.Stat. Ann. 13:3886 acts only to supplement Louisiana's preexisting constructive notice scheme in Louisiana foreclosure actions."<sup>90</sup> The court went on to state that "[t]he provision gives property owners, whose identities a reasonably diligent, responsible state actor could not reasonably ascertain, the opportunity to request such notice and thereby become ascertainable," and the court qualified its holding in that "the statute does not relieve the responsible state actor in a particular case from exercising the 'reasonable diligence' appropriate in the circumstances to ascertain, reasonably, the identity of an individual or entity subject to the deprivation of property."<sup>91</sup>

In another decision, *Davis Oil Company v. Mills*, the Fifth Circuit indicated that "Louisiana may not rely upon a legal fiction of implied waiver of due process rights to cure constitutional defects in its constructive notice provisions."<sup>92</sup> Furthermore, the court expressly rejected the reasoning in *Mid-State Homes* to the extent that the court's decision implies that Louisiana Revised Statutes 13:3886 is "constitutionally ad-

---

86. La. Code Civ. P. arts. 2334, 2724.

87. 652 F. Supp. 640 (W.D. La. 1987).

88. 462 U.S. 791, 103 S. Ct. 2706 (1983).

89. 652 F. Supp. at 645. See also *Bankers Life Co. v. Shost*, 518 So. 2d 563 (La. App. 5th Cir. 1987).

90. 878 F.2d 883, 892-93 (5th Cir. 1989).

91. Id. at 893 n.9.

92. 873 F.2d 774, 788 (5th Cir. 1989), cert. denied, 110 S. Ct. 331 (1989).

equate as the sole determinant of parties entitled to notice of the seizure of property."<sup>93</sup> More pointedly, the court stated that "[t]he Louisiana request-notice statute does not relieve a creditor of this constitutional obligation if the creditor has reasonable means at its disposal to identify those parties whose interests will be adversely affected by the foreclosure."<sup>94</sup>

Thus, in view of the decisions in *Small Engine Shop* and *Davis*, a prudent seizing creditor will give actual notice to third possessors and other third persons holding interests in and to the property whose identities are reasonably identifiable, despite the plain language of Louisiana Revised Statutes 13:3886.

### C. *Rights of Third Possessors*

A "third possessor" is one who has acquired the property subject to the mortgage or privilege thereon and who has not assumed the payment of the indebtedness secured by that mortgage.<sup>95</sup> Certain rights of third possessors are specified in Louisiana Civil Code articles 3399 and 3405-10. The rights of a third possessor of property which is to be sold under executory process are set forth in Louisiana Code of Civil Procedure article 2703, which states:

When property sold or otherwise alienated by the original debtor or his legal successor has been seized and is about to be sold under executory process, a person who has acquired the property subject to the mortgage or privilege thereon and who has not assumed the payment of the indebtedness secured thereby may:

- (1) Pay the balance due on the indebtedness, in principal, interest, attorney's fees, and costs;
- (2) Arrest the seizure and sale on any of the grounds mentioned in Article 2751, or on the ground that the mortgage or privilege was not recorded, or that the inscription of the recordation thereof had preempted; or,
- (3) Intervene in the executory proceeding to assert any claim which he has to the enhanced value of the property due to improvements placed on the property by him, or by any prior third possessor through whom he claims ownership of the prop-

---

93. *Id.*

94. *Id.*

95. In *re Union Cent. Life Ins. Co.*, 23 So. 2d 63, 73 (La. 1945) stated that "obviously the third person possessor, or third possessor . . . is some one other than a mere tenant, a trespasser, or one having only physical possession." See also *Federal Land Bank v. Cook*, 179 La. 857, 155 So. 249 (1934); *Thompson v. Levy*, 50 La. Ann. 751, 23 So. 913 (1898).

erty. This intervention shall be a summary proceeding initiated by a petition complying with Article 891.

### *1. Right to Satisfy Underlying Indebtedness*

Louisiana Code of Civil Procedure article 2340 provides that the "sale of the property may be prevented at any time prior to the adjudication by payment to the sheriff of the judgment, with interest and costs" and is made applicable to executory proceedings by Louisiana Code of Civil Procedure article 2724. This right is consistent with the principle embodied in Civil Code article 1855 that performance, a mode of extinguishing an obligation, "may be rendered by a third person, even against the will of the obligee." Louisiana Code of Civil Procedure article 2340 does not, by its terms, limit to the mortgagor the right to prevent the judicial sale by paying the sheriff.

### *2. Right to Arrest Seizure and Sale*

The second option available to a third possessor under Louisiana Code of Civil Procedure article 2703 is the right to seek, by way of Louisiana Code of Civil Procedure article 2751, an injunction arresting the seizure and sale of property "when the debt secured by the security interest, mortgage, or privilege is extinguished, or is legally unenforceable, or if the procedure required by law for an executory proceeding has not been followed." Louisiana Code of Civil Procedure article 2703(2) additionally provides for an injunction "on the ground that the mortgage or privilege was not recorded, or that the inscription of the recordation thereof had preempted." The injunction to arrest the judicial sale is more fully discussed in Part VC2 and 3 hereof.

### *3. Right to Seek Enhanced Value*

A general principle of Louisiana law is that a third possessor is entitled to compensation for improvements made on mortgaged property to the extent that the improvements enhanced the value of the mortgaged land.<sup>96</sup> The third possessor, however, must be able to prove that the alleged improvements did in fact enhance the value of the mortgaged land<sup>97</sup> and cannot recover more than the sum he or she expended on the improvements.<sup>98</sup>

---

96. La. Civ. Code art. 3407; *New Orleans Land Co. v. Southern States Fair-Pan American Exposition Co.*, 143 La. 884, 79 So. 525 (1918); *Citizens Bank v. Miller*, 44 La. Ann. 199, 10 So. 779 (1892).

97. *Citizens Bank v. Miller*, 44 La. Ann. 199, 10 So. 779 (1892).

98. *Glass v. Ives*, 169 La. 809, 126 So. 69 (1930).



#### D. Federal Tax Liens

If the property affected by the mortgage is subject to a federal tax lien imposed pursuant to federal law, the relevant inquiry is whether that lien is discharged by virtue of the foreclosure sale. Under the provisions of the Federal Tax Lien Act of 1966, the "lien imposed by section 6321 [of Title 26, U.S.C.A.] shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary."<sup>99</sup> Notice of a tax lien, in the case of real property, must be filed "in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated."<sup>100</sup> In 1987, Louisiana adopted the Uniform Federal Lien Registration Act which provides that notices of federal tax liens "upon immovable property . . . shall be filed in the office of the parish recorder of mortgages of the parish in which the immovable property subject to the liens is situated."<sup>101</sup>

Under the Federal Tax Lien Act of 1966, a distinction is drawn between sales pursuant to "judicial proceedings" and "other sales" in that each type of sale is governed by a separate provision.<sup>102</sup> In *Myers v. United States of America*,<sup>103</sup> certain property was adjudicated to a mortgagee at a foreclosure sale pursuant to executory process. As a consequence of the sale, the clerk of court cancelled all encumbrances, including federal tax liens bearing against the property. The bank then sold the property to Mr. Myers. The United States executed a levy against the property pursuant to the Federal Tax Lien Act of 1966, whereupon Mr. Myers brought an action for wrongful levy. Despite the fact that the federal tax liens had been cancelled after the foreclosure sale, the court deemed the property subject to those liens because of failure to comply with the federal notice provisions. The court stated:

Since Louisiana's executory foreclosure proceeding is not a plenary judicial proceeding, it necessarily falls within the ambit of § 7425(b). Section 7425(b) provides that where notice of a federal tax lien is duly filed more than thirty days prior to the date of the foreclosure sale, the sale will be made subject to the federal lien unless written notice of the sale is served upon the United States at least twenty-five days before the sale is held.<sup>104</sup>

---

99. 26 U.S.C.A. § 6322-6323 (1989).

100. 26 U.S.C.A. § 6323(f)(1)(A)(i) (1989).

101. La. R.S. 52:51-:57 (enacted by 1987 La. Acts No. 348 § 1).

102. "Judicial proceedings" and "other sales" are governed by 26 U.S.C.A. §§ 7425(a) and 26 U.S.C.A. § 7425(b) (1988) respectively.

103. 647 F.2d 591 (5th Cir. 1981).

104. *Id.* at 601.

The Federal Tax Lien Act further provides that notice of the sale "shall be given (in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary or his delegate."<sup>105</sup>

#### IV. MORTGAGES AFFECTING MINERAL LEASES

##### A. Introduction

Oil, gas and mineral leases, as well as interests in those leases, fall under the broad category "mineral rights."<sup>106</sup> As such, these rights are classified as incorporeal immovables to which the laws relative to immovables in general apply.<sup>107</sup> Under Louisiana Revised Statutes 31:203, a "mineral right is susceptible of mortgage to the same extent and with the same effect, and subject to the same provisions of rank, inscription, reinscription, extinguishment, transfer, and enforcement as is prescribed by law for mortgages of immovables under Article 3289 of the Civil Code."<sup>108</sup>

##### B. Appointment of Keeper

Louisiana Revised Statutes 9:5131-:5140 allow parties to a mortgage affecting mineral rights to designate an individual as a keeper of the mortgaged property in the event of a seizure. Louisiana Revised Statutes 9:5131 provides:

If a mineral right affected by a mortgage executed under the provisions of R.S. 31:203 [the Louisiana Mineral Code] is seized as an incident to an action for the enforcement of such mortgage, the court issuing the order under which the seizure is to be effected shall direct the sheriff or other officer making the seizure to appoint as keeper of the mineral right such person as the parties may have designated as herein provided.

The powers, duties and compensation of the keeper are set forth in Louisiana Revised Statutes 9:5132-:5135. The keeper may be directed by the court to render an accounting of his administration; thus, it is

---

105. 26 U.S.C.A. § 7425(c)(1) (1988). See also I.R.S. Pub. No. 786, Instructions for Preparing Notice of Nonjudicial Sale of Property and Application for Assent to Sale. This publication specifies the type of information to be provided to the Service in order to effect proper notice in accordance with 26 U.S.C.A. § 7425(b) (1966).

106. La. R.S. 31:16 (1989).

107. La. R.S. 31:18 (1989).

108. La. R.S. 31:203 (1989 and Supp. 1990). See also *Richey v. Venture Oil & Gas Corp.*, 346 So. 2d 875 (La. App. 4th Cir.), writ denied, 350 So. 2d 891 (1977).

essential that proper records be maintained. This statute embodies legislative recognition of the fact that a civil sheriff lacks both the technical expertise and facilities to properly and prudently administer producing mineral properties. This ability is especially important where valuable, producing mineral properties are involved since these properties must be adequately maintained pending the sale. Otherwise, the quality or quantity of production and, consequently, the security of the mortgagee, could be seriously impaired.

### C. Joint Operating Agreements

Co-owners of oil, gas and mineral leases often enter into agreements called "joint operating agreements," which provide for the exploration, development, operation, or production of mineral rights. Joint operating agreements are customarily unrecorded. The public records doctrine enunciated in *McDuffie v. Walker*<sup>109</sup> dictates that these unrecorded agreements should not be binding upon third persons, including a purchaser at a judicial sale. Louisiana Revised Statutes 9:2731, however, provides that such agreements "shall be binding upon third persons when the agreement is filed for registry in the conveyance records of the parish or parishes where the lands affected by the mineral rights are located." Moreover, Louisiana Revised Statutes 9:2732 permits the recordation of a mere declaration in lieu of the agreement.

General "first-to-file" principles apply to these agreements. For instance, if the mortgage is recorded before the joint operating agreement or the declaration of that agreement, a purchaser of mineral rights at judicial sale would *not* be bound by the joint operating agreement.

The interaction of mortgages and joint operating agreements was addressed in *Grace-Cajun Oil Co. No. 3 v. Federal Deposit Insurance Corp.*<sup>110</sup> In that case, the obligation of a secured creditor to pay well costs out of production was declared. The Court's decision turned on the fact that the mortgage "was made subject to the operating agreement." Another factor influencing the decision was the principle that "the owner of property cannot pledge any right greater than that owned."<sup>111</sup> Since the mortgagor's undivided working interest was burdened by the legal obligation to pay its share of operating costs,<sup>112</sup> the pledgee's interest was similarly burdened. Unanswered by the *Grace-*

---

109. 125 La. 152, 51 So. 100 (1909).

110. 882 F.2d 1008, 1009 (5th Cir. 1989).

111. *Id.* at 1011.

112. *Huckabay v. The Tex. Co.*, 227 La. 191, 78 So. 2d 829 (1955) ("on several occasions this Court has applied the equitable rule that where one co-owner (or co-lessee) has explored and developed a field without the concurrence or assistance of the other, the former is bound to account to that other for his proportionate share of the proceeds less a proportionate share of the expenses.")

*Cajun* court is the question of how the same case would be decided if the mortgage is *not* made subject to the operating agreement. Considering the court's analysis and the intrinsic obligation of a working interest owner to pay its share of operating costs, one might conclude that a creditor whose mortgage is not made subject to the operating agreement must also pay well costs from production revenues.<sup>113</sup>

#### D. Oil and Gas Lien Statute

The enforcement of a mortgage affecting oil, gas and mineral leases often corresponds to the mortgagor's failure to pay third party suppliers or furnishers of laborers. Upon the mortgagor's failure to pay, these creditors often file lien affidavits. The mortgagee must then determine whether its mortgage is superior to the liens granted by law to these suppliers or furnishers. The lien rights of such persons are granted by Louisiana Revised Statutes 9:4861-:4867 and are significant for the attorney contemplating a mortgage foreclosure.

Louisiana Revised Statutes 9:4861-:4867 provide that any person performing labor or providing services or supplies in connection with the drilling or operating of a well or wells in search of oil or gas is accorded a lien and privilege upon the oil, gas and mineral lease(s) on which the well is drilled, the oil or gas produced therefrom, and the proceeds thereof inuring to the operating interest and upon all equipment located on the well site, whether movable or immovable, in the amount of such unpaid labor, services or supplies, together with the cost of preparing and recording the privilege plus ten (10%) per cent attorney's fees. The lien is effected by filing notice of the lien in the mortgage records of the parish where the property is located within 180 days of the date on which the last labor or services are performed, or the date on which the last materials are delivered.<sup>114</sup>

In recent years, much of the litigation in this area involved the validity of lien rights in the absence of a timely notice of lien filing.<sup>115</sup>

---

113. See *Southwest Gas Producing Co. v. Creslenn Oil Co.*, 181 So. 2d 63 (La. App. 2d Cir. 1965) (public records doctrine did not apply where the mortgage made express reference to the operating agreement).

114. La. R.S. 9:4862 (Supp. 1990).

115. Timely filing not mandatory: *I. E. Miller of Eunice, Inc. v. Source Petroleum, Inc.*, 484 So. 2d 239 (La. App. 3d Cir.), *aff'd*, 493 So. 2d 1141 (1986) and *Western Wireline Services, Inc. v. Pecos Western Corp.*, 377 So. 2d 892 (La. App. 4th Cir. 1979). Timely filing mandatory: *Louisiana Materials Co. v. Atlantic Richfield Co.*, 486 So. 2d 776 (La. App. 4th Cir.), *rev'd*, 493 So. 2d 1141 (1986) and *C-Craft Marine Servs., Inc. v. Llog Exploration Co.*, 470 So. 2d 241 (La. App. 4th Cir. 1985). In *Genina Marine Servs., Inc. v. Arco Oil & Gas Co.*, 499 So. 2d 257 (La. App. 1st Cir. 1986), the court was called upon to decide the issue left unresolved by the supreme court in *Louisiana Materials*. The court adopted the position of the third circuit in *I. E. Miller of Eunice*

Therefore, in 1986 the legislature amended Louisiana Revised Statutes 9:4865(1) to provide that the privilege shall be extinguished if the "claimant or holder of the privilege does not preserve it as required by R.S. 9:4862."<sup>116</sup>

Important for the attorney contemplating foreclosure to keep in mind is the rule that the lien primes all privileges or mortgages except those granted for non-payment of taxes, a bona fide vendor's privilege or privileges, or mortgages filed prior to the date on which the first labor, services or supplies were furnished. This ranking of liens is especially important in light of Louisiana Code of Civil Procedure provisions which prevent the sale of encumbered property if the offered price is insufficient to satisfy the claims of specified creditors. Specifically, Article 2337 provides that, "if the price offered by the highest bidder at either the first or any subsequent offering is not sufficient to discharge the costs of the sale and the mortgages, liens and privileges superior to that of the seizing creditor, the property shall not be sold." On the other hand, if the mortgage of the seizing creditor is superior to other mortgages, liens or privileges on the property, the seizing creditor may require that the property be sold, even though the price bid is not sufficient to satisfy the superior or the inferior mortgages, liens and privileges.<sup>117</sup> Thus, the attorney must determine if the mortgage is superior to any such lien claims.

In determining the validity and rank of liens reflected on the mortgage certificate, one must be cognizant of Louisiana Revised Statutes 9:4865(2), which extinguishes the privilege if the "claimant or holder of the privilege does not institute an action thereon within one year after the date of *recordation* of notice of the privilege." Suit may be brought either in the parish where the immovable property is situated or in a parish of proper venue under Louisiana Code of Civil Procedure article 42.<sup>118</sup> Thus, to determine if the privilege has prescribed as provided in Louisiana Revised Statutes 9:4865, one must research the litigation records of all parishes of proper venue. If, as a consequence of such research, the prescription of the privilege is established, the inscription of such privilege might be cancelled as provided in Louisiana Revised Statutes 9:5162.

#### *E. Notice to Commissioner of Conservation*

The oil and gas industry is regulated in Louisiana by the Conservation Act, Louisiana Revised Statutes 30:1-:78. The conservation laws

---

and held that, "in regards to unrecorded liens or liens recorded outside the Section 4862 time period, suit must be filed within one year of the last day on which services are performed."

116. 1986 La. Acts No. 191 § 1.

117. La. Code Civ. P. art. 2338.

118. La. Code Civ. P. art. 72.

are administered by the Commissioner of Conservation<sup>119</sup> who has jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of the Conservation Act and all other laws relating to the conservation of oil or gas.<sup>120</sup> Among the many powers vested in the Commissioner of Conservation is the "authority to make . . . any reasonable rules, regulations, and orders that are necessary from time to time in the proper administration and enforcement of" the Conservation Act.<sup>121</sup> Of particular relevance, the Commissioner is expressly given the authority to make rules, regulations, or orders to

require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the escape of oil or gas out of one stratum to another; to prevent the intrusion of water into oil or gas strata; to prevent the pollution of fresh water supplies by oil, gas, or salt water; to require the plugging of each dry and abandoned well and the closure of associated pits, the removal of equipment, structures, and trash, and to otherwise require a general site cleanup of such dry and abandoned wells; and to require reasonable bond with security for the performance of the duty to plug each dry or abandoned well and to perform the site cleanup required by this Paragraph.<sup>122</sup>

Pursuant to this express authority, the Commissioner of Conservation promulgated Statewide Order No. 29-B, effective August 1, 1943, relative to the plugging and abandonment of wells.<sup>123</sup>

In order to facilitate the exercise of this authority by the Commissioner of Conservation, the 1990 legislature enacted Louisiana Revised Statutes 30:74(A)(3) to provide as follows:

Prior to any sheriff's sale or public auction of any property *related to the operation of oil and gas wells*, the person seeking such sale shall notify the commissioner [of conservation] of such sale not less than thirty days prior to such sale. The commissioner may, if he deems it appropriate to insure the proper plugging and abandonment of the wells and closure of the associated oilfield pits, retain a first lien and privilege on such property, which lien and privilege shall follow such property into the hands of the third persons whether such persons are in good or bad faith. (Emphasis added.)

---

119. La. R.S. 30:1(A) (1989).

120. La. R.S. 30:4(A) (1989). See also *Nunez v. Wainoco Oil & Gas Co.*, 488 So. 2d 955 (La. 1986) for a thorough analysis of the conservation laws and of the authority vested in the Commissioner of Conservation.

121. La. R.S. 30:4(C) (1989).

122. La. R.S. 30:4(C)(1) as amended by 1990 La. Acts No. 192.

123. For an illustration of the problems which can be encountered as a consequence of a failure to properly plug and abandon a well, see *Magnolia Coal Terminal Co. v. Phillips Oil Co.*, 561 So. 2d 732 (La. App. 4th Cir. 1990).

The scope of this statute is not clear in that the reference to "any property *related* to the operation of oil and gas wells" might contemplate only movable property, such as surface equipment, or it might reach the oil, gas and mineral leases owned by the Operator of an "oil and gas well." Moreover, while authority for the retention by the Commissioner of Conservation of "a first lien and privilege on such property" is expressly recognized, no provision is made for the manner in which the Commissioner might manifest his election to retain such lien and privilege. The retention of this "first lien and privilege" is not self-operative in every instance, only in those cases where the Commissioner of Conservation "deems it appropriate to insure the proper plugging and abandonment of the wells and closure of the associated oilfield pits."

## V. JUDICIAL SALE

### A. Legal Advertisement

After seizing the property, the sheriff must advertise the sale of the property<sup>124</sup> in the manner provided by Louisiana Code of Civil Procedure article 2331, which stipulates that notice of the sale be published at least twice for immovable property.<sup>125</sup> Louisiana Code of Civil Procedure article 2722 mandates that the advertisement shall proceed "in accordance with the provisions of the *first* paragraph of Article 2331." Therefore, the requirement contained in the *second* paragraph of Article 2331, that the sheriff shall not order the advertisement until the expiration of three days after service of the notice of seizure, does not apply. Accordingly, advertisement may commence immediately after seizure of the property.<sup>126</sup>

Louisiana Revised Statutes 43:203(2) requires that "the first newspaper advertisement of such notice shall be published at least thirty days before the date of the judicial sale, and the second advertisement shall be published not earlier than seven days before, and not later than the day before, the judicial sale." The journal in which the publication must be run and the rates for publication are also governed by statute.<sup>127</sup> Furthermore, publication "shall be made in the English language and may in addition be duplicated in the French language."<sup>128</sup>

---

124. La. Code Civ. P. art. 2722.

125. La. Code Civ. P. art. 2331.

126. This conclusion is supported by La. Code Civ. P. art. 2724. Cf. *First Fin. Bank v. Hunter Forest Ltd. Partnership*, 456 So. 2d 1380 (La. 1984).

127. La. R.S. 43:201, :205 (1982).

128. La. R.S. 43:204 (1982).

## B. Appraisement

### 1. Appraisal of Property

#### a. Notice to Appoint Appraisers

If the sale is to be made with benefit of appraisal, then, at least seven days before the date of the sale, exclusive of holidays, the sheriff must serve written notice on the debtor and on the seizing creditor, directing each to name an appraiser to value the property and to notify the sheriff of his appointment prior to the time stated in the notice, which shall be at least four days before the sale, exclusive of holidays.<sup>129</sup> This notice to appoint an appraiser may be contained in the notice of seizure required by Louisiana Code of Civil Procedure article 2721 without the necessity of a separate notice.<sup>130</sup>

#### b. Appointment of Appraisers

In the event that there are two or more debtors or seizing creditors who cannot agree on the appointment of the appraiser, "the court shall designate the party to act as or appoint the appraiser," and the notice shall be served on that party.<sup>131</sup> If the named party fails to timely appoint an appraiser and inform the sheriff of the appointment in accordance with the notice, the sheriff shall appoint the appraiser for such party.<sup>132</sup>

In *Baumann v. Fields*,<sup>133</sup> the judgment debtor sued to annul the judicial sale of his property under a writ of *fieri facias* on the basis of an improper appraisal. At the time the notice to appoint the appraisers was served on the parties, the plaintiff indicated to the sheriff that he would not appraise the property. Based upon this statement, the sheriff appointed an appraiser for the plaintiff. The appraisal of the seizing creditor was consistent with the appraisal of the appraiser appointed by the sheriff. Less than twenty-four hours before the sale, but after the appraisals of both the seizing creditor and the sheriff-appointed appraiser were filed, the plaintiff insisted on his right of appraisal. Although the sheriff permitted the plaintiff to appraise the property, which resulted in an appraisal that greatly exceeded the previously filed appraisals, the

---

129. La. R.S. 13:4363(A) (Supp. 1990).

130. *Fidelity Nat'l Bank of Baton Rouge v. Pitchford*, 374 So. 2d 149 (La. App. 1st Cir. 1979).

131. La. R.S. 13:4363(B) (1968).

132. La. R.S. 13:4364 (Supp. 1990).

133. 332 So. 2d 885 (La. App. 2d Cir. 1976).



sheriff sold the property on the basis of the earlier filed, lower appraisals. The plaintiff contended that the sheriff had no right to appoint an appraiser for him until a disagreement occurred regarding the parties' appraisals. Since the plaintiff's appraisal followed that of the sheriff's appointee, he argued that no agreement or disagreement could exist until such appraisal was filed; therefore, the sheriff's appointment of an appraiser was premature. The court denied the relief requested by the plaintiff and upheld the sale on the basis of the fact that the plaintiff had indicated to the sheriff that he would not appraise the property and that, consequently, the sheriff was thereby authorized to appoint an appraiser for the plaintiff.

*c. Oath of Appraisers*

Appraisers must take an oath to make a true and just appraisal of the property.<sup>134</sup> In *Plauche-Locke Securities, Inc. v. Johnson*,<sup>135</sup> an appraisal was deemed valid where the appraisers signed a form of appraisal stating that they had been "duly appointed and sworn to make an appraisal," although they did not take a formal oath. Generally, however, the oath must be taken by the appraiser and may not be taken on behalf of the appraiser by another person.<sup>136</sup>

*d. Qualification of Appraisers*

The law does not require that the appraiser be a disinterested party.<sup>137</sup> Indeed, that a "party to an action or proceeding" may serve as an appraiser is implicitly recognized in Louisiana Revised Statutes 13:4366A(3), which provides that a "party to an action or proceeding who acts as an appraiser is not entitled to a fee." Appraisers should personally examine and inspect the seized property<sup>138</sup> and should possess some degree of knowledge and experience with regard to the type of property to be appraised.

*e. Minuteness of Appraisal*

The property seized must be appraised with such minuteness that it can be sold separately or together.<sup>139</sup> One case dealing with the appraisal of equipment emphasizes the importance of a "minute appraisal." In

---

134. La. R.S. 13:4365(A) (Supp. 1990).

135. 187 So. 2d 178, 181 (La. App. 3d Cir. 1966).

136. *Bourgeois v. Sazdoff*, 209 So. 2d 320, 325 (La. App. 4th Cir. 1968) ("The taking of an oath is a personal thing, as much so as an appendectomy, and it cannot be taken or subscribed in a representative capacity.").

137. *Consolidation Loans, Inc. v. Guercio*, 200 So. 2d 717 (La. App. 1st Cir. 1967).

138. *Ford Motor Credit Co. v. Blackwell*, 295 So. 2d 522, 525 (La. App. 4th Cir. 1974) (Morial, J., concurring) ("A valuation of property absent actual knowledge of the property attained via an inspection is not an *appraisal*.").

139. La. R.S. 13:4365(C) (Supp. 1990).

*International Harvester Credit Corp. v. Majors*,<sup>140</sup> the defendant-debtor opposed a deficiency judgment on the ground that the six encumbered pieces of farm equipment had not been properly appraised. In the executory proceedings, the appraisers listed the pieces of farm equipment separately although the appraisal form in the pleadings indicated that the property was appraised "in globo" for a lump sum. Noting that this appraisal would not enable the separate sale of the equipment, the court reversed a summary judgment in favor of the plaintiff. The court went on to state that

[t]he obvious purpose of minute appraisals under the statute is to protect debtors from unnecessary deficiency judgments by encouraging more competitive bidding on each piece of equipment sold rather than forcing prospective buyers to bid on the equipment in globo. It is certainly possible, if not probable, that more money could have been realized from the sale had the farm equipment been sold separately. In order to accomplish that, each piece of equipment would, of necessity, have had to be appraised separately. The record in this case leads us to conclude that this obviously was not done.<sup>141</sup>

This requirement of a minute appraisal that will permit a separate sale of the mortgaged property suggests certain interesting situations not yet addressed by the courts. For example, in connection with the appraisal of a six-acre parcel of land of which, say, two and one-half acres is comprised of an apartment development and the balance of three and one-half acres is undeveloped, should the developed two and one-half acres be appraised separately from the undeveloped three and one-half acres? Similarly, in connection with the appraisal of a "package" of oil, gas and mineral leases, should each oil, gas and mineral lease be separately appraised? Should the unitized, productive portion of the leases be appraised separately from the non-unitized portion?

Another problem arises in connection with the appraisal of mortgaged property which was unimproved on the date of execution of the mortgage, but which is improved subsequent to the recordation of the mortgage by the construction of buildings or other constructions permanently attached to the ground.<sup>142</sup> Under Louisiana Civil Code article

---

140. 467 So. 2d 1251 (La. App. 2d Cir. 1985).

141. *Id.* at 1254.

142. Under La. Civ. Code art. 463, "[b]uildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees, are component parts of a tract of land when they belong to the owner of the ground."

3310, the conventional mortgage, once established on an immovable, includes all the improvements which it may afterwards receive.<sup>143</sup> Since the writ of seizure and sale is prepared in accordance with the legal description contained in the mortgage and since that description would not refer to improvements not then in existence, parties must ensure that the appraiser assess the value of the land under mortgage, as well as the improvements situated on the land.

Another nuance of the minute appraisal requirement involves a financing arrangement where both a commercial premises and inventory are involved. In such a situation one might confect separate mortgages for the real estate and for the inventory. Drafting distinct mortgage agreements for each type of property separates the precise or minute appraisal required for the inventory from the less cumbersome appraisal of the immovable property.

One means of ensuring that an appraisal will pass judicial muster is to give the debtor and any surety advance notice of the manner in which the appraisal will be confected. The courts have indicated that where a debtor receives advance notice of an appraisal and the debtor does not object to that appraisal, that debtor is precluded from challenging the propriety of the appraisal after the sale. *First Federal Savings and Loan Association of Lake Charles v. Morrow*<sup>144</sup> involved a debtor's appeal to avoid a deficiency judgment because of an alleged failure to properly appraise the property in connection with the seizure and sale of the property. In dismissing the debtor's argument, the court noted:

They [the debtors] were notified of each and every step in the seizure and sale proceeding. If they wished to question the procedure, it was incumbent on them to challenge the process before the sale was made rather than sit back and save their attack only if they were not pleased with the result of the sale.<sup>145</sup>

The jurisprudence further dictates that an appraisal be accurate and detailed.<sup>146</sup> For instance, if the mortgagor owns an undivided interest in the mortgaged property, the precise undivided interest should be recited in the legal advertisement and the appraiser should base his appraisal thereon.<sup>147</sup> Language in an advertisement indicating the judicial sale of a judgment debtor's "right, title and interest" in certain real estate does not meet the precision requirement.<sup>148</sup>

---

143. See also La. R.S. 9:5391 (Supp. 1990) relative to "additions, accessions, and natural increases subject to mortgage."

144. 469 So. 2d 424 (La. App. 3d Cir. 1985).

145. *Id.* at 427.

146. *Ardoin v. Fontenot*, 374 So. 2d 1273 (La. App. 3d Cir. 1979).

147. *Mulling v. Jones*, 153 La. 1091, 97 So. 202 (1923).

148. *Lambert v. Bond*, 234 La. 1092, 102 So. 2d 467 (1958); *Dearmond v. Courtney*,

*f. Filing of Appraisals and Compensation*

Appraisals must be written, signed, and delivered to the sheriff. Before 1987, Louisiana Revised Statutes 13:4365B provided that, when the appraisers cannot agree on the value of the property, "the sheriff shall appoint a third appraiser, who shall also be sworn, and whose decision shall be final." Many sheriffs have construed this provision to mean that the two appraisals had to be absolutely identical or a third appraisal was necessary. This provision was amended in 1987 to permit averaging of the two non-agreeing appraisals under certain circumstances. Averaging is allowed where the difference between the two appraisals does not exceed \$250,000 and the value assigned by the lower of the two appraisals is at least 90% of the value assigned by the higher of the two appraisals. Otherwise, the sheriff must appoint a third appraiser. The appointed appraiser's decision is final and he must be sworn in.

Compensation for appraisers is governed by Louisiana Revised Statutes 13:4366. An appraiser who is a party to the proceeding is not entitled to a fee.<sup>149</sup> All other appraisers receive a fee fixed by the sheriff between \$25 and \$75 unless the court orders a greater fee. These fees are taxed as costs.

*2. Deficiency Judgment*

*a. General*

An appraisal conducted "in accordance with the law" is necessary before a creditor can secure a deficiency judgment. Louisiana Code of Civil Procedure article 2771 provides:

The creditor may obtain a judgment against the debtor for any deficiency due on the debt after the distribution of the proceeds of the judicial sale only if the property has been sold under the executory proceeding after appraisal in accordance with the provisions of Article 2723.

Louisiana Code of Civil Procedure article 2723 generally provides that seized property must be appraised before a judicial sale unless the appraisal has been waived in the mortgage document, the plaintiff has requested that the property be sold without appraisal, and the court has issued an order directing sale without an appraisal.

Although an appraisal may be waived in the act of mortgage,<sup>150</sup> this waiver merely affords the seizing creditor two options. First, the creditor

---

12 La. Ann. 251 (1857); *Moore v. Knapp*, 7 La. Ann. 21 (1852); and *Gales v. Christy*, 4 La. Ann. 293 (1849).

149. La. R.S. 13:4366(A)(3) (Supp. 1990).

150. See, e.g., *Credithrift of America, Inc. v. Williams*, 426 So. 2d 339 (La. App. 2d Cir., 1983).

may forego the time and expense associated with an appraisal, in which case the creditor cannot obtain a deficiency judgment. Second, the creditor may go ahead and secure an appraisal thereby preserving his rights to a deficiency judgment in the event that the proceeds generated by the sale are insufficient to satisfy the indebtedness.

According to the Deficiency Judgment Act, adopted in 1934 and contained in Louisiana Revised Statutes 13:4106, a creditor or mortgagee who has taken advantage of a waiver of appraisal *cannot* obtain a deficiency judgment. A creditor can, however, proceed *in rem* against *other* property securing the same mortgage, even though one of the properties was sold without an appraisal. Furthermore, Louisiana Revised Statutes 13:4107 declares this rule of law a matter of public policy which cannot be waived by a debtor.<sup>151</sup>

The Deficiency Judgment Act was enacted because "sales without appraisal often produce an unfair price."<sup>152</sup> The legislature also believed that such a reduced sales price "should not be treated as the equivalent of a price produced by a sale with appraisal, which must bring two-thirds of the appraised value or be readvertised."<sup>153</sup> Unappraised sales are, therefore, treated as if the proceeds are sufficient to pay off the entire debt.

The statutory rule that the requirement of appraisal is a matter of public order has been echoed by the Louisiana Supreme Court. In *League Central Credit Union v. Montgomery*, the court noted that the cases holding that executory proceedings cannot be had where proper authentic evidence is not submitted are consistent with the general principle set out in Article 12 of the Louisiana Civil Code that whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed.<sup>154</sup>

The absolute sanctity of the appraisal requirement is emphasized by the jurisprudence before the supreme court decisions in *Guaranty Bank of Mamou v. Community Rice Mill, Inc.*<sup>155</sup> and *First Guaranty Bank, Hammond, La. v. Baton Rouge Petroleum Center, Inc.*<sup>156</sup> Prior to these decisions, case law indicated that a creditor could not obtain or pursue a deficiency judgment after a judicial sale conducted without an appraisal or a judicial sale preceded by an otherwise invalid executory proceeding. As a result of this trend most requests for a deficiency judgment were

---

151. Cf. La. Civ. Code arts. 11, 12.

152. *General Motors Acceptance Corp. v. Smith*, 399 So. 2d 1285, 1287 (La. App. 4th Cir. 1981).

153. *Id.*

154. 251 La. 971, 207 So. 2d 762 (1968).

155. 502 So. 2d 1067 (La. 1987).

156. 529 So. 2d 834 (La. 1988).

denied.<sup>157</sup> The opinions in *Guaranty Bank of Mamou* and *First Guaranty*

---

157. See generally *Howard Trucking Co., Inc. v. Stassi*, 485 So. 2d 915 (La. 1986) (contract styled as lease was actually sale subject to Deficiency Judgment Act); *League Central Credit Union v. Montgomery*, 251 La. 971, 207 So. 2d 762 (1968) (executory proceedings based upon non-authentic act of mortgage); *Federal Nat'l Mortgage Ass'n v. Prudential Property and Casualty Ins. Co.*, 517 So. 2d 201 (La. App. 1st Cir. 1987) (loss payee under homeowner's insurance policy could not recover where fire damaged home sold without appraisal); *Chrysler Credit Corp. v. Walker*, 488 So. 2d 209 (La. App. 4th Cir. 1986) (non-authentic mortgage used as basis of executory process); *American Security Bank of Ville Platte v. Dufour*, 465 So. 2d 162 (La. App. 3d Cir. 1985) (*dation en paiement* without appraisal); *Massey-Ferguson Credit Corp. v. Douglas*, 448 So. 2d 817 (La. App. 2d Cir. 1984) (untimely appraisal); *Credithrift of America, Inc. v. Williams*, 426 So. 2d 339 (La. App. 2d Cir. 1983) (untimely appraisal); *Bank of St. Charles and Trust Co. v. Great S. Coach Corp.*, 424 So. 2d 462 (La. App. 5th Cir. 1982) (no certified copy of corporate resolution attached to executory process petition); *First Guaranty Bank v. Ratcliff*, 424 So. 2d 289 (La. App. 1st Cir. 1982) (no authentic act of mortgage attached to executory process petition); *Justice v. Caballero*, 393 So. 2d 866 (La. App. 4th Cir. 1981) (consensual private sale of merchandise without appraisal by holder of note secured by vendor's privilege); *Chrysler Credit Corp. v. Stout*, 404 So. 2d 304 (La. App. 3d Cir. 1981) (failure of executory process petition to allege breach of condition of mortgage which matured obligation); *Clark v. Selago Federal Credit Union*, 405 So. 2d 1286 (La. App. 4th Cir. 1981) (private sale without appraisal); *Bank of New Orleans & Trust Co. v. Brule*, 389 So. 2d 1148 (La. App. 4th Cir. 1980) (failure to serve notice of seizure); *Ardoine v. Fontenot*, 374 So. 2d 1273 (La. App. 3d Cir. 1979) (incomplete written appraisal form containing no description of property and no assigned value); *Murdock Acceptance Corp. v. S & H Distributing Co., Inc.*, 331 So. 2d 870 (La. App. 2d Cir. 1976) (private sale without appraisal); *General Motors Acceptance Corp. v. Boutte*, 338 So. 2d 363, 364 (La. App. 3d Cir. 1976) (failure of appraisers to make "a true and just appraisalment"); *Ford Motor Credit Co. v. Blackwell*, 295 So. 2d 522 (La. App. 4th Cir. 1974) (no personal inspection of appraised property); *Powell v. Motors Ins. Corp.*, 235 So. 2d 593 (La. App. 1st Cir. 1970) (loss payee under comprehensive insurance policy could not recover where fire damaged car sold without appraisal); *Ford Motor Credit Co. v. Samec*, 227 So. 2d 164 (La. App. 2d Cir. 1969) (sale by executory process for less than two-thirds of appraised value); *Pickering v. Kinney*, 205 So. 2d 199 (La. App. 2d Cir. 1968) (no showing by plaintiff-creditor of compliance with appraisalment statutes); *Bourgeois v. Sazdoff*, 209 So. 2d 320 (La. App. 4th Cir. 1968) (oath attempted to be taken by attorney for seizing creditor; sale without legal advertisement); *Wall v. McKean*, 205 So. 2d 482 (La. App. 1st Cir. 1967) (private sale without appraisal); *Bickham Motors, Inc. v. Crain*, 185 So. 2d 271 (La. App. 1st Cir. 1966) (failure of keeper to properly care for vehicle resulting in extreme diminution in value); *Carr v. Lattier*, 188 So. 2d 645 (La. App. 2d Cir. 1966) (no appraisal at all); *Gumina v. Dupas*, 159 So. 2d 377 (La. App. 4th Cir. 1964) (no appraisal at all); *Universal C.I.T. Credit Corp. v. Hulett*, 151 So. 2d 705 (La. App. 3d Cir. 1963) (automobile repossessed in Louisiana and sold in Indiana at nonjudicial public sale without appraisal); *Tapp v. Guaranty Finance Co.*, 158 So. 2d 228, 233 (La. App. 1st Cir. 1963) (endorsement on note not in authentic form; deficiency judgment granted after such defective executory process annulled on basis of "fraud or ill practice"); *Mack Trucks, Inc. v. Dixon*, 142 So. 2d 605 (La. App. 4th Cir. 1962) (executory proceedings filed and prosecuted in court of incompetent jurisdiction); *Shreveport Auto Finance Corp. v. Harrington*, 113 So. 2d 476 (La. App. 2d Cir. 1959) (private sale without appraisal; note granted for deficiency held unenforceable as being

*Bank*, however, make it clear that the Deficiency Judgment Act does not apply to all situations and that deficiency judgments will not be automatically denied.

In *Guaranty Bank of Mamou*,<sup>158</sup> the Louisiana Supreme Court held that the Deficiency Judgment Act applies only "to the procurement of a deficiency judgment following a judicial sale pursuant to a writ of seizure and sale issued in an executory proceeding." The court further stated that it did "not consider that the legislature intended the Deficiency Judgment Act to apply to situations where property sold pursuant to a writ of fi.fa. is insufficient to satisfy a judgment."<sup>159</sup>

On rehearing the supreme court in *First Guaranty*<sup>160</sup> reversed its original opinion and held that a defect or deficiency in the authentic evidence offered by a seizing creditor in support of executory process is not a defense to a subsequent action for a deficiency judgment. The court expressly overruled an earlier decision in *League Central Credit Union v. Montgomery*,<sup>161</sup> stating that "there is nothing in its [the Deficiency Judgment Act's] history or expressions that indicates an intention to bar a creditor who fully complies with appraisal requirements from obtaining a deficiency judgment simply because of a lack of authentic evidence in the executory proceedings." The court further stated that the "legislated law does not require a creditor to prove that he presented flawless authentic evidence in the executory proceeding in order to obtain a deficiency judgment or grant the debtor a defense to a deficiency judgment based upon the creditor's failure to do so."

#### b. Application to Sureties

Both Louisiana Code of Civil Procedure article 2771 and Louisiana Revised Statutes 13:4106 speak of protecting the "debtor," but do not expressly address the question of whether the Deficiency Judgment Act also protects the surety of a note. Two conflicting lines of cases inter-

---

attempt to circumvent statute); *Atlas Finance Corp. v. Whitehead*, 99 So. 2d 481 (La. App. Orl. 1958) (consensual private sale without appraisal); *David Investment Co. v. Wright*, 89 So. 2d 442 (La. App. 1st Cir. 1956) (private sale without appraisal); *Soileau v. Pitre*, 79 So. 2d 628 (La. App. 1st Cir. 1955) (private sale without appraisal; note granted for deficiency held unenforceable as being attempt to circumvent statute); *Liberal Finance Corp. v. Washington*, 62 So. 2d 545 (La. App. Orl. 1953) (private sale without appraisal); *Farmer v. Smith*, 57 So. 2d 778 (La. App. 1st Cir. 1952) (private sale without appraisal); *Futch v. Gregory*, 40 So. 2d 830 (La. App. 2d Cir. 1949) (private sale without appraisal); *Southland Inv. Co. v. Lofton*, 194 So. 125 (La. App. 2d Cir. 1940) (private sale without appraisal); *Home Finance Serv. v. Walmsley*, 176 So. 415 (La. App. Orl. 1937) (private sale without appraisal).

158. 502 So. 2d 1067, 1071 (La. 1987).

159. *Id.*

160. 529 So. 2d 834 (La. 1988).

161. 251 La. 971, 207 So. 2d 762 (1968).

preting this statute have emerged in the courts. One line holds that the sale without proper appraisal of the mortgaged property releases the surety while the other line of cases holds that the Act protects only the mortgage debtor and not the surety. Therefore, in the latter case a surety might be liable for a deficiency judgment even though the mortgage debtor is discharged.

The leading case extending the protection of the Deficiency Judgment Act to sureties is *Simmons v. Clark*.<sup>162</sup> The plaintiff in *Simmons* foreclosed on the mortgage debtor's property and sold the property without appraisal. The creditor then sued the defendant on his collateral security note for the deficiency. The court, relying primarily on Louisiana Civil Code articles 3060 and 3061, held that the petitioner could not collect the deficiency from the surety. Article 3060 allows the surety to interpose the principal debtor's nonpersonal defenses against the creditor. Article 3061 provides that the surety is discharged when the creditor does anything that impairs the surety's subrogation rights. Clearly, in this case, the defense interposed by the surety was a nonpersonal defense of the debtor which would bar recovery of the deficiency against the principal debtor. The sale without appraisal also eliminated any rights of the creditor against the debtor to which the surety could be subrogated. Hence, the creditor lost his rights against the surety.<sup>163</sup>

Courts in the contrary line of cases conclude that a surety is not protected by the Deficiency Judgment Act. The leading case for this position is *Southland Investment Co. v. Motor Sales Co.*<sup>164</sup> This case involved an arrangement to refinance notes given to the defendant in payment for automobiles. The plaintiff purchased these notes from the defendant under an unconditional agreement, whereby the defendant retained possession of the repossessed cars. The plaintiff, with the consent and acquiescence of the defendant, repossessed and sold some of the cars without appraisal. When the plaintiff sought to collect the deficiency, the defendant argued that the sale without appraisal had discharged the primarily liable as well as the secondarily liable parties. The court rejected this argument and held the surety liable for the deficiency since the purpose of the Act is to protect mortgage debtors rather than those secondarily liable. One might, however, discount the court's ruling as *dicta*. In *Southland*, the defendant-endorser, who possessed the items subject to the mortgage, consented to and acquiesced in the sale. The surety's intimate involvement with the sale process therefore led the

---

162. 64 So. 2d 520 (La. App. 1st Cir. 1953).

163. Id. See also *General Motors Acceptance Corp. v. Smith*, 399 So. 2d 1285 (La. App. 4th Cir. 1981); *Exchange Nat'l Bank of Chicago v. Spalitta*, 295 So. 2d 18 (La. App. 4th Cir. 1974), rev'd, 321 So. 2d 338 (La. 1975); and *Wilson v. Brian*, 81 So. 2d 142 (La. App. 2d Cir. 1955).

164. 198 La. 1028, 5 So. 2d 324 (1941).



court to use an estoppel theory to prevent the defendant from utilizing the protection of the Deficiency Judgment Act.<sup>165</sup>

Courts have also held that the Deficiency Judgment Act only protects mortgage debtors who own an interest in the property and not other persons, such as an endorser, guarantor or accommodation party, who own no interest in the property.<sup>166</sup>

*c. Application to Private, Non-Judicial, Sales*

The recent decision in *Guaranty Bank of Mamou v. Community Rice Mill, Inc.*<sup>167</sup> has apparently resolved the question of the extent to which the Deficiency Judgment Act applies to private, non-judicial sales. As previously mentioned, the court in *Guaranty* held that the Deficiency Judgment Act only applies "to the procurement of a deficiency judgment following a judicial sale pursuant to a writ of seizure and sale issued in an executory proceeding." An analysis of the law which had developed prior to this case is necessary to understand the impact of that decision.

Louisiana Revised Statutes 13:4108, enacted in 1986, provides that certain actions by a mortgagee will not bar a creditor's ability to procure a deficiency judgment.<sup>168</sup> Generally, a mortgagee or other creditor may pursue any debtor, guarantor, or surety for a deficiency judgment even though that creditor foreclosed on and sold the property at either a private or judicial sale. Whether an appraisal has been performed and whether the property was acquired from the debtor, guarantor, or surety pursuant to a *dation en paiement* does not affect the creditor's ability to pursue a deficiency judgment. Also, the minimum bid at the foreclosure sale is irrelevant. The creditor cannot, however, obtain a judg-

---

165. See *Commercial Credit Eq. Corp. v. Larry Parrott of Gueydan*, 212 So. 2d 860 (La. App. 3d Cir. 1968) and *Farmerville Bank v. Scheen*, 76 So. 2d 581 (La. App. 2d Cir. 1954).

166. *Ford Motor Credit Co. v. Soileau*, 323 So. 2d 221 (La. App. 3d Cir. 1975).

167. 502 So. 2d 1067, 1071 (La. 1987).

168.

A. As an exception to La. R.S. 13:4106 and :4107 if a mortgagee or other creditor holds a mortgage, pledge, security interest, or privilege which secures an obligation in a commercial transaction, the mortgagee or other creditor may collect from or pursue any debtor, guarantor, or surety for a deficiency judgment on the secured obligation whether or not the mortgagee or other creditor has foreclosed on all or any of the property and sold such property at a judicial, public or private sale, with or without appraisal, regardless of the minimum bid, and whether or not the mortgagee or other creditor has acquired such property from any debtor, guarantor, or surety pursuant to a complete or partial *dation en paiement*. However, other than with regard to a required transaction subject to Chapter 9 of the Louisiana Commercial laws, a mortgagee may not pursue any debtor, guarantor, or surety for more than the secured obligation, minus the reasonably equivalent value of the property sold.

ment for more than the amount of the secured obligation minus the "reasonably equivalent value" of the property sold.<sup>169</sup>

The court in *First Guaranty Bank, Hammond, La. v. Baton Rouge Petroleum Center, Inc.*, found that this statute "is substantive in nature and retroactive application would operate to disturb the vested rights of the defendant."<sup>170</sup>

Prior to the enactment of this statute, it was clear that a sale without appraisal, whether private or public, resulted in the forfeiture of deficiency judgment rights.<sup>171</sup> In *American Security Bank of Ville Platte v. Dufour*,<sup>172</sup> plaintiff bank had taken title to a lot of ground which was then the subject of a mortgage in its favor securing a debt owed to it by the defendant debtor. The parties in this transaction agreed to the value of the property so transferred and an appropriate credit was given to the debtor. This transfer was accomplished by means of a giving in payment.<sup>173</sup> The bank then sued the defendant seeking a deficiency judgment. The court dismissed the demands of the plaintiff bank, stating that:

[u]nder the jurisprudence it is clear that the stringent public policy provisions of La. R.S. 13:4106 prohibit the rendition of a deficiency judgment in favor of the mortgage creditor where the creditor has provoked a sale, judicial or private, without the benefit of appraisal. (citation omitted). The provisions also prohibit the rendition of a deficiency judgment in favor of the mortgage creditor where the debtor has voluntarily relinquished the property mortgaged to the creditor at his insistence [sic] without benefit of appraisal. (citations omitted).<sup>174</sup>

Prior to this legislation, the question was whether a creditor who takes title in a private sale with the benefit of appraisal can thereafter seek a deficiency judgment against its debtor. In no reported case have deficiency judgment rights been recognized in favor of a secured creditor who acquires title in a private sale with the benefit of appraisal.

---

169. Reasonably equivalent value is defined as

the value that the owner and the mortgagee or other creditor of the property being sold or otherwise disposed of agree to attribute to the property for the purposes of reducing the secured debt.

La. R.S. 13:4108.1 (Supp. 1990).

170. 529 So. 2d 834, 837 (La. 1988). See also *Federal Nat'l Mortgage Ass'n v. Prudential Property and Casualty Ins. Co.*, 517 So. 2d 201 (La. App. 1st Cir. 1987).

171. *Clay-Dutton, Inc. v. Plantation Nursing Home of New Orleans, Inc.*, 239 So. 2d 442 (La. App. 4th Cir. 1970); *Wall v. McKean*, 205 So. 2d 482 (La. App. 1st Cir. 1967); and *Carr v. Lattier*, 188 So. 2d 645 (La. App. 2d Cir. 1966).

172. 465 So. 2d 162 (La. App. 3d Cir. 1985).

173. La. Civ. Code art. 2655.

174. 465 So. 2d at 165.

Dicta in *Associates Investment Co. v. Alewine*,<sup>175</sup> however, indicates that, when a private sale is made with appraisal, a deficiency judgment may be had.

In *Associates Investment Co.*, plaintiff sought a deficiency judgment after the private sale of two motor vehicles and sought recognition of its chattel mortgage as to certain other property. The defendant interposed an objection of no cause of action, which was sustained. The premise of the objection asserted by defendant was that, under the facts alleged, the Deficiency Judgment Act would bar recovery by plaintiff. In sustaining the defendant's objection of no cause of action, the court stated:

We observe that there is nothing in plaintiff's petition which indicates that the motor vehicles constituting a portion of the security pledged in the chattel mortgage were sold *without* appraisalment. The only allegation in connection with this sale recites the fact that

"\* \* \* petitioner seized and sold at private sale  
the two motor vehicles \* \* \* ."

We think this in itself, in the absence of the establishment as a fact of the sale of the vehicles without appraisalment, would be sufficient to destroy the validity of defendant's exception. However, inasmuch as counsel for all parties involved have chosen to interpret the sale as having been consummated without appraisalment, we prefer not to predicate our conclusion upon this ground.<sup>176</sup>

The court reversed and remanded the case relying on the provisions of Louisiana Revised Statutes 13:4106, which, in addition to denying a deficiency judgment under specified circumstances, permits the creditor to nonetheless proceed *in rem* as to other collateral. The implication of the quoted passage, therefore, is that, if a private sale is made with appraisal, the Deficiency Judgment Act is not violated.

In *University Properties Corp. v. Fidelity National Bank of Baton Rouge*,<sup>177</sup> the debtor and defendant bank entered into a *dation en paiement* wherein certain property was transferred to defendant in order to reduce the indebtedness by an agreed amount and a new note was granted for the balance of the loan. The bank later advised plaintiff that the new note was not valid and failed to pay the interest due on it. Plaintiff brought a declaratory judgment action seeking a decree that

---

175. 84 So. 2d 214, 215 (La. App. 2d Cir. 1955).

176. *Id.* at 215.

177. 500 So. 2d 888 (La. App. 1st Cir. 1986).

"the obligation was null because it was obtained in violation of the Louisiana Deficiency Judgment Act."<sup>178</sup>

After an extensive review of the Deficiency Judgment Act and the relevant jurisprudence, the court questioned whether the intent of the Louisiana Deficiency Judgment Act was to "penalize a lenient creditor for entering into an agreement that *benefits* the debtor."<sup>179</sup> The court considered, but declined to apply, the absolute bar rule enunciated in prior cases. The court stated:

Although we decline to apply the *absolute* bar rule to partial dations, we believe any applicable rule should protect debtors (and sureties) from overbearing creditors and preclude circumvention of the public policy of the LDJA. Accordingly, for cases arising prior to the effective date of Act 489 (August 30, 1986), we hold that, whenever a creditor and debtor (and/or surety) enter into a partial dation of the encumbered (mortgaged or otherwise) property of the debtor without benefit of appraisal, a presumption arises that the agreement does not benefit (is unfavorable to) the debtor (and/or surety) and constitutes an attempt to unlawfully circumvent the LDJA, thus precluding a deficiency judgment in favor of the creditor. However, this *presumption is rebuttable*, and the *creditor* bears the *burden* of showing he acted in good faith, the agreement was consented to by the debtor (and/or the surety) and the agreement benefited (was favorable to) the debtor (and/or the surety). If the creditor can make such a showing, the partial dation is not in violation of the LDJA and the creditor is entitled to a deficiency judgment, if all other requirements of law have been met. (emphasis in original).<sup>180</sup>

This decision precedes the supreme court decision in *First Guaranty Bank, Hammond, La. v. Baton Rouge Petroleum Center*.<sup>181</sup> *First Guaranty Bank* held that Louisiana Revised Statutes 13:4108 is substantive and cannot be retroactively applied. Thus, if *First Guaranty Bank* expresses the law as it stands today, then *University Properties* was properly decided, but for the wrong reasons.

### 3. Judicial Sale as Fraudulent Transfer

Appraisals are important for several reasons. First, unless the property has been validly appraised, the mortgagee may not recover a de-

---

178. Id. at 889.

179. Id. at 907.

180. Id.

181. 529 So. 2d 834 (La. 1988).

iciency judgment. Second, the appraised value controls the determination of whether or not the property will be sold at the sale. If the price bid by the highest bidder at the sale is less than two-thirds of the appraised value, the property will not be sold.<sup>182</sup> Finally, depending on the amount bid at the foreclosure sale, the judicial sale of property might be set aside as a fraudulent transfer under Section 107(d)(2) of the Bankruptcy Code.<sup>183</sup>

In *Durrett v. Washington National Insurance Co.*,<sup>184</sup> the Fifth Circuit held that a non-collusive foreclosure of real property pursuant to a Texas deed of trust was a "fraudulent transfer" within the meaning of 11 U.S.C.A. § 107(d)(2) where the amount bid was approximately 57.7% of the fair market value of the property.<sup>185</sup> The Court stated:

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the property.

Thus, even if the property is sold at the judicial sale for in excess of two-thirds of its appraised value, unless it is sold for at least 70% of its fair market value, the judicial sale might be set aside as a fraudulent transfer in the event that the mortgagor becomes involved in bankruptcy proceedings instituted within one year from the date of the sale.<sup>186</sup> Unless the case is earlier closed or dismissed, a bankruptcy trustee has two years from the date of the filing of the petition within which to seek to avoid as a fraudulent transfer a judicial sale "made" within one year before the date of the filing of the petition.<sup>187</sup> Thus, the purchaser at a judicial sale could conceivably find itself in a three-year hiatus from the date of the sale before it can be certain that its title is inviolate.

### C. Judicial Sale

#### 1. General

Unless the debt is satisfied prior to the sale; unless the sale is enjoined pursuant to Louisiana Code of Civil Procedure articles 2642

---

182. La. Code Civ. P. art. 2336.

183. 11 U.S.C.A. § 107(d)(2) (West Supp. 1990).

184. 621 F.2d 201 (5th Cir. 1980).

185. See also *In Re Madrid*, 725 F.2d 1197 (9th Cir. 1984); *Abramson v. Lakewood Bank and Trust*, 647 F.2d 547 (5th Cir. 1981).

186. 11 U.S.C.A. § 548(a) (West 1979 and Supp. 1990).

187. 11 U.S.C.A. § 546(a) (West 1979 and Supp. 1990).

and 2751 or unless the proceeding is otherwise compromised, the sale will take place as scheduled.

According to Louisiana Revised Statutes 13:4341, a judicial sale in connection with an executory proceeding takes place "at the courthouse, or at some other public place in the vicinity of the courthouse" on any Monday, Wednesday, Friday or Saturday of the month, beginning at 10 a.m., after the expiration of the time required by law for the advertisement of such sales.<sup>188</sup> Louisiana Code of Civil Procedure article 2334 provides: "At the time and place designated for the sale, the sheriff shall read aloud the advertisement describing the property, and shall read aloud a mortgage certificate and any other certificate required by law." The sheriff's *proces verbal* should affirmatively reflect that the sheriff complied with the above article by reading aloud the pertinent certificates.<sup>189</sup>

Louisiana Code of Civil Procedure article 2295 permits the judgment debtor to designate "the order in which the items or portions of property will be sold." This article only pertains to executions pursuant to a writ of *fieri facias* and does not apply to foreclosures by executory process.<sup>190</sup>

Louisiana Revised Statutes 13:4344 governs the situation where the mortgage records of the applicable parish have been destroyed in whole or in part.

"The sheriff shall announce that the property is to be sold for cash subject to any mortgage, lien, or privilege thereon superior to that of the seizing creditor."<sup>191</sup> Despite the reference in Louisiana Code of Civil Procedure article 2235 to "cash," courts have allowed sheriffs the discretion to accept personal checks. Furthermore, if the check is successfully negotiated, no argument can be made that the check does not meet the terms of an advertisement of cash payment. In *Capital Building and Loan Association v. Nicholas*,<sup>192</sup> the court stated:

It would not be possible for an adjudicatee at public auction to have a cashier's check, a certified check, or a similar negotiable instrument at the bidding without knowing the exact sale price. Further it would be impracticable to require all bidders to carry money to cover whatever amount is needed to buy at public auction.

Louisiana Revised Statutes 13:4360 specifies the consequences of the failure of a purchaser to comply with the terms of the sale. When a

---

188. See *Bankers Life Co. v. Shost*, 518 So. 2d 563 (La. App. 5th Cir. 1987) wherein the property was advertised and the judicial sale commenced at 11 a.m.

189. *Cresap v. Kilpatrick*, 51 So. 2d 130 (La. App. Orl. 1951).

190. *First Financial Bank v. Hunter Forest Ltd. Partnership*, 456 So. 2d 1380 (La. 1984).

191. La. Code Civ. P. art. 2335.

192. 330 So. 2d 364 (La. App. 4th Cir. 1976).

purchaser fails to make full payment or provide a deposit, the seizing creditor may direct the sheriff either to re-offer the property immediately or re-advertise the property. If the purchaser makes the required deposit but fails to pay the entire purchase price within thirty days after the adjudication, any interested party may demand that the property be re-advertised. If the property is re-advertised, the second sale shall be at the risk and for the account of the first purchaser. The first purchaser is precluded from bidding at the second sale and is liable for any loss. Should the property bring a higher price, however, the first purchaser has no claim to the increase. If no loss occurs because of the resale, any deposit is returned to the first purchaser.<sup>193</sup>

Property is sold "subject to any security interest, mortgage, lien, or privilege thereon superior to that of the seizing creditor."<sup>194</sup> Additionally, "property is sold subject to any real charge or lease with which it is burdened, superior to any security interest, mortgage, lien, or privilege of the seizing creditor."<sup>195</sup> These proscriptions, however, are merely applications of the public records doctrine.<sup>196</sup>

If the property is to be sold with the benefit of an appraisal, the highest bid cannot be "less than two-thirds of the appraised value."<sup>197</sup> If the price bid by the highest bidder at the sale is less than two-thirds of the appraised value, the property cannot be sold and the sheriff must re-advertise the sale of the property "in the same manner as for an original sale, and the same delay must elapse."<sup>198</sup> At the second offering, the property is sold for the highest bid price; however, if the price offered by the highest bidder at either the first or any subsequent offering is not sufficient to discharge the costs of the sale and the mortgages, liens and privileges superior to that of the seizing creditor, the property cannot be sold.<sup>199</sup> On the other hand, if the mortgage of the seizing creditor is superior to other mortgages, liens or privileges on the property, the seizing creditor may require that the property be sold, even though the price bid is not sufficient to satisfy the superior or the inferior mortgages, liens and privileges.<sup>200</sup> The judgment debtor and the seizing

---

193. La. R.S. 13:4362 (1968).

194. La. Code Civ. P. art. 2335. See also *Ponder v. Vernon*, 357 So. 2d 622, 623 (La. App. 1st Cir. 1978) ("Ordinarily, the doctrine of caveat emptor applies to judicial sales. A court can only order sold the rights of the parties to the proceedings and there is no warranty of title. The purchaser is chargeable with matters of public record, readily ascertainable, which affect the property.").

195. La. Code Civ. P. art. 2372.

196. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

197. La. Code Civ. P. art. 2336.

198. *Id.*

199. La. Code Civ. P. art. 2337.

200. La. Code Civ. P. art. 2338. This article was amended by the Legislature in 1987

creditor may bid for the property.<sup>201</sup> If the bid of the seizing creditor is accepted, and if the amount of his accepted bid is the amount of his security plus costs, the seizing creditor will simply pay the amount of costs to the sheriff.<sup>202</sup>

## 2. *Injunction to Arrest Seizure and Sale*

Louisiana Code of Civil Procedure article 2751 provides that the seizure and sale of property may be arrested by injunction "when the debt secured by the security interest, mortgage, or privilege is extinguished, or is legally unenforceable, or if the procedure required by law for an executory proceeding has not been followed." A temporary restraining order to arrest the seizure and sale of immovable property, however, may not be issued.<sup>203</sup>

When a temporary restraining order or preliminary injunction is available but has been improperly issued, unless the proceedings are stayed, the court may, in addition to awarding damages, allow the sheriff "to proceed with the sale by virtue of the prior advertisement, if not expired."<sup>204</sup>

Louisiana Code of Civil Procedure article 2753(A) specifies certain circumstances under which security is not required in connection with the issuance of a temporary restraining order or preliminary injunction. Article 2753(C) provides that a temporary restraining order or preliminary injunction shall not be issued on the basis of "a claim that the attorneys fees established in the mortgage or privilege to be enforced are unreasonable."<sup>205</sup> Rather, any such claim may be urged in a rule to show cause filed at least ten days before the sale. The rule to show cause must be tried summarily prior to the date of the sale or in conjunction with a proceeding seeking a deficiency judgment.

If a party unsuccessfully seeks a preliminary injunction, that party's right of appeal is governed by Louisiana Code of Civil Procedure article 3612, which provides:

There shall be no appeal from an order relating to a temporary restraining order.

An appeal may be taken as a matter of right from an order

---

La. Acts No. 939 to provide that, if the seizing creditor is not present or represented at the judicial sale, "the property shall not be sold for less than the amount necessary to fully satisfy his writ plus the costs."

201. La. Code Civ. P. art. 2339.

202. Capital Sav. Ass'n v. Runnels, 361 So. 2d 458 (La. App. 1st Cir. 1978).

203. La. Code Civ. P. art. 2752(A).

204. La. Code Civ. P. art. 2752(B).

205. La. Civ. Code art. 2000; Leenerts Farms, Inc. v. Rogers, 421 So. 2d 216 (La. 1982).



or judgment relating to a preliminary or final injunction, but such an order or judgment shall not be suspended during the pendency of an appeal unless the court in its discretion so orders. An appeal from an order or judgment relating to a preliminary injunction must be taken and a bond furnished within fifteen days from the date of the order or judgment. The court in its discretion may stay further proceedings until the appeal has been decided.

Except as provided in this article, the procedure for an appeal from an order or judgment relating to a preliminary or final injunction shall be as provided in Book III.

The appellate delays are fifteen days from the *signing of the order*, not from notice of the order or seizure, nor from date of mailing of the order or judgment.<sup>206</sup>

The jurisprudence has indicated that the party against whom the executory proceeding has been brought, where such party chooses to appeal only the denial of a preliminary injunction, may not by such appeal obtain an order staying the seizure and sale of the property.<sup>207</sup> The policy considerations leading this jurisprudential rule are that the mortgagor-appellant has the choice of appealing the order granting executory process under Louisiana Code of Civil Procedure article 2642 or seeking to enjoin the execution of such order through the injunctive process as provided by Louisiana Code of Civil Procedure articles 2751 and 2752. Where the mortgagor-appellant chooses only the latter course of action, courts will not allow that party to indirectly prevent the sale of the property in question through Louisiana Code of Civil Procedure article 3612 and avoid the more onerous bond requirements and earlier appellate delay provided by Louisiana Code of Civil Procedure article 2642.

Language in the *Hibernia National Bank of New Orleans v. Mary*<sup>208</sup> decision supports this theory. Specifically, the court stated:

To interpret the stay order, as evidently intended by the respondent judge, to apply to the proceeding of executory process would allow to be done indirectly that which there is no authority

---

206. *Citizens Bank & Trust Co. v. Carr*, 498 So. 2d 217 (La. App. 1st Cir. 1986); *First Guaranty Bank v. Perilloux*, 498 So. 2d 239 (La. App. 1st Cir. 1986).

207. See *Acme Mortgage Co. v. Cross*, 445 So. 2d 1239 (La. App. 4th Cir. 1983); *Tri-South Mortgage Investors v. Rozands*, 354 So. 2d 669 (La. App. 1st Cir. 1977); *Utah-Louisiana Investment Co. v. International Dev., Inc.*, 262 So. 2d 553 (La. App. 1st Cir. 1972); and *Hibernia Nat'l Bank of New Orleans v. Mary*, 167 So. 2d 200 (La. App. 4th Cir. 1964) (each of these cases involved attempts by the party against whom the executory process was brought to stay such proceedings pursuant to La. Code Civ. P. art. 3612).

208. 167 So. 2d 200 (La. App. 4th Cir. 1964).

to do directly, namely, to operate as a suspensive appeal from executory process, after the right to such appeal has passed, and then for a nominal bond.<sup>209</sup>

It is apparent that what offended the Court in *Hibernia* and its progeny is that the mortgagor-appellant, against whom the executory process action was brought, chose to circumvent the high bond requirement of Louisiana Code of Civil Procedure article 2642, and attempted to obtain the same relief through Louisiana Code of Civil Procedure articles 2751 and 2752, while posting a relatively minimal bond.

Louisiana Code of Civil Procedure article 2703 does not by its terms include the right to appeal the order authorizing executory process among the rights of a third possessor. One might argue, however, that a third possessor is not a party to the action at the time of issuance of the order and, in any event, does not have standing to appeal such order.

Authority exists for the proposition that, pursuant to Louisiana Code of Civil Procedure article 3612, a court has the power to stay the sheriff's seizure and sale of property in an executory proceeding.<sup>210</sup> In *Utah-Louisiana Investment Co. v. International Development Inc.*,<sup>211</sup> the court stayed the seizure and sale of property to the defendants who had appealed the denial of a preliminary injunction. The court in this case issued an order staying all proceedings, including the seizure and sale of the property, pending the disposition of the appeal of the lower court's denial of a preliminary injunction. The court cited the equities of the case and the desire to avoid irreparable injuries to the parties as its reasons for its decision.

### 3. Grounds for Injunctive Relief

The itemization in Louisiana Code of Civil Procedure article 2751 of grounds for the injunction is not exclusive.<sup>212</sup> Moreover, Louisiana Code of Civil Procedure article 2753, in particularizing those grounds which do not require the furnishing of security, provides a listing of specific grounds for which an injunction might be obtained. Furthermore, the jurisprudence indicates that an injunction may be granted for a myriad of reasons.<sup>213</sup>

---

209. *Id.* at 203.

210. *Fabacher v. Hammond Dairy Co., Inc.*, 389 So. 2d 87 (La. App. 4th Cir. 1980); *Utah-Louisiana Inv. Co. v. International Dev., Inc.*, 262 So. 2d 551 (La. App. 1st Cir. 1972) (a companion case to *Utah-Louisiana*, 262 So. 2d 553).

211. 262 So. 2d at 553.

212. La. Code Civ. P. art. 2751 and comments thereto.

213. See, e.g., the listing in Shacklette and Emanuel, Section on Consumer Law, 35 La. B.J. 436-37 (1988).

#### *D. Compensation of Sheriff*

The sheriff is entitled to compensation, computed as follows:

A. Sheriffs, except in the parish of Orleans, shall be entitled to no more than the following fees and compensation of office in all civil matters:

(7)(a) For commission on sales of property made by the sheriffs, three percent shall be allowed on the price of adjudication of immovable property, and six percent shall be allowed on the price of adjudication of movable property.

(b) When the amount necessary to be realized to satisfy any writ under which the property, movable or immovable, is to be offered for sale by the sheriffs is in excess of fifty thousand dollars, including interest and costs, the sheriffs and the seizing creditor may, with the approval of the court, agree upon the fee or commission to be paid to the sheriffs for making the sale, irrespective of the rates hereinabove set forth, prior to the offer and adjudication of the property by the sheriffs.

(c) No agreement shall be valid which provides for a fee or commission in any case of less than fifteen hundred dollars.<sup>214</sup>

The compensation payable to the sheriff may be negotiated prior to the date of the sale and with the approval of the court. An early case held that, where the seizing creditor is the purchaser at the judicial sale, the sheriff cannot collect a commission on that part of the sale price compensated by the debt due the seizing creditor.<sup>215</sup>

#### *E. Sheriff's Deed and Disposition of Proceeds*

Certain requirements exist for the form and content of the act of sale to be passed by the sheriff.<sup>216</sup> Additionally, Louisiana Code of Civil Procedure article 2373 states that the purchaser at a judicial sale "is liable for nothing beyond the purchase price." Of course, the purchaser must pay the purchase price or the judicial sale is absolutely null.<sup>217</sup> Article 2373 of the Code of Civil Procedure specifies the manner in

---

214. La. R.S. 33:1428(A) (1988 and Supp. 1990).

215. *Investors Mortgage Co. v. Prejean*, 8 La. App. 46 (1928). However, the decision in this case was based upon the language of Act No. 203 of the 1898 Legislature which imposed the fee on the net amount "collected and paid over to the party causing the execution or order of seizure and sale to issue."

216. La. Code Civ. P. art. 2342; La. R.S. 13:4353-4356 (1968).

217. *Placid Oil Co. v. A. M. Dupont Corp.*, 244 La. 1075, 156 So. 2d 444 (1963).

which the proceeds of the sale are to be distributed. After costs are deducted, the seizing creditor is paid first. Then any inferior mortgages, liens, or privileges are satisfied. Any surplus goes to the debtor. A third person claiming a mortgage or privilege on property seized in an executory proceeding may assert his right to share in the distribution of the proceeds of the sale of the property by intervention.<sup>218</sup> The court in *Hibernia Homestead and Savings Association v. Fletcher*<sup>219</sup> held that the word "may" in Louisiana Code of Civil Procedure article 1092 is permissive and, therefore, does not mandate that a claimant proceed by intervention. A "third person claiming a mortgage or privilege on the property seized in an executory proceeding" may, therefore, also proceed by rule, pursuant to Louisiana Code of Civil Procedure article 2592.

#### F. Action to Annul Judicial Sale

##### 1. General

The mortgagor may attack the judicial sale for substantive defects, even if no injunction was sought or suspensive appeal taken, provided the seizing creditor is the adjudicatee at the sale.<sup>220</sup> If a third party acquired the property at the judicial sale, however, the sale may not be rescinded.<sup>221</sup> All "informalities of legal procedure" in connection with a judicial sale are prescribed in two years.<sup>222</sup> Actions to set aside sheriffs' deeds are prescribed by five years, reckoning from their date.<sup>223</sup> The court in *Peyrefitte v. Harvey*,<sup>224</sup> noted that the prescription specified in Louisiana Civil Code article 3543<sup>225</sup> applies to actions to annul a judicial sale based on "informalities" while Louisiana Revised Statutes 9:5642 applies to actions to annul a judicial sale based on "radical" defects.<sup>226</sup> Additionally, Louisiana Revised Statutes 13:4112 provides in pertinent part:

---

218. La. Code Civ. P. art. 2643.

219. 181 So. 2d 815 (La. App. 4th Cir. 1966).

220. *Brown v. Everding*, 357 So. 2d 1243 (La. App. 2d Cir. 1978). See *Ellerd v. Williams*, 364 So. 2d 648 (La. App. 2d Cir. 1978) ("By analogy, since a judgment can be annulled because of fraud or ill practices [under La. Code Civ. P. art. 2004], a sheriff's sale pursuant to a judgment ordering executory process should be subject to annulment for the same reasons where the fraud or ill practices were done by the creditor and adjudicatee and no third party rights have intervened.").

221. *Peyrefitte v. Harvey*, 312 So. 2d 159 (La. App. 1st Cir. 1975).

222. La. R.S. 9:5622 (Supp. 1990).

223. La. R.S. 9:5642 (1983).

224. 312 So. 2d 159 (La. App. 1st Cir. 1975).

225. Now La. R.S. 9:5622 (Supp. 1990).

226. See also *Bordelon v. Bordelon*, 180 So. 2d 855 (La. App. 3d Cir. 1965).

No action may be instituted to set aside or annul the judicial sale of immovable property by executory process by reason of any objection to form or procedure in the executory proceedings, or by reason of the lack of authentic evidence to support the order and seizure, where the sheriff executing the foreclosure has either filed the proces verbal of the sale or filed the sale for recordation in the conveyance records of the parish.

## 2. "Chilling" the Sale

Conduct on the part of a party which tends to prevent competition at the judicial sale has been held to be cause to annul the sale. This rule was announced as early as 1918.<sup>227</sup> The expression "chilling" the sale has its origin in *Konen v. Konen*,<sup>228</sup> wherein the court stated:

One of the objects of sales at public auction is to obtain a fair price for those interested in the proceeds of the property. This is said to be the great object of the rules regulating such sales. Hence the concealment or misrepresentation of facts, amounting to fraud, is not the only cause for annulling a judicial sale, but anything said or done by one who becomes an adjudicatee, for the purpose of preventing competition at the sale, or, in other words, for the purpose of chilling it, which is reasonably capable of doing so, and has that effect, will be sufficient to annul the sale.<sup>229</sup>

## G. Damages for Wrongful Seizure

In the event of a wrongful seizure of property in connection with an enforcement of a mortgage by executory process, damages may be awarded to the mortgagor without a showing of malice or bad faith and even if the seizure is only constructive in nature and the owner is

---

227. *Swain v. Kirkpatrick Lumber Co.*, 143 La. 30, 38, 78 So. 140, 142 (1918) ("The judgment of the trial court in setting aside the sheriff's sale was also fully justified because of the acts of defendant's agent in deterring another from bidding, regardless of what his motive was, honest or fraudulent. His acts caused great prejudice to this plaintiff by preventing others from giving a greater price for the lumber.").

228. 165 La. 288, 290, 115 So. 490, 491 (1928).

229. See also *Bailey v. Metro Federal Sav. and Loan Ass'n of Lake Charles*, 642 F. Supp. 616 (W.D. La. 1986); *First Nat'l Bank of Abbeville v. Hebert*, 162 La. 703, 709, 111 So. 66, 69 (1927) ("An agreement whereby parties engage not to bid against each other at a public auction, especially where the auction is required or directed by law, as in sales of property under execution, and where one of the parties to the agreement is a party to the proceeding, is a sufficient cause for annulling the sale."); *Boyd v. Farmers-Merchants Bank & Trust Co.*, 433 So. 2d 339 (La. App. 3d Cir. 1983).

not actually deprived of the physical possession of the property.<sup>230</sup> Although the court in *Escat v. National Bank of Commerce in New Orleans*<sup>231</sup> held that "attorney's fees are recoverable for the dissolution of wrongful seizures under executory process," it has been held by the supreme court that attorney's fees were not recoverable. The supreme court in *General Motors Acceptance Corp. v. Meyers*<sup>232</sup> expressly "disapprove[d] of the line of cases from the Courts of Appeal allowing attorney's fees in the case of executory process," including *Escat*.<sup>233</sup> Attorney's fees have, however, been awarded for the dissolution of a wrongful seizure under authority of the Unfair Trade Practices and Consumer Protection Law.<sup>234</sup> Louisiana Code of Civil Procedure article 2751 authorizes an injunction to arrest a seizure and sale and provides that damages, including attorney's fees, may be allowed to the defendant, if the court finds the seizure to be wrongful.

Whatever remedy is available to a party, it does not appear that an action would lie against "the Sheriff or persons acting under his direction who acted in accordance with the directive of the court."<sup>235</sup>

## VI. CONCLUSION

An executory proceeding prosecuted in strict compliance with the legal requirements is a valuable and expeditious remedy for a mortgagee. Because of judicial insistence that the procedural requirements of Louisiana law be strictly respected, counsel for the mortgagee must be cognizant of all phases of the executory proceeding. The rights of a mortgagee might be affected not only by the pleadings prepared and actions taken by his counsel, but also by actions taken by public officers.<sup>236</sup> Thus, the actions of individuals over whom the mortgagee and his counsel have no actual control must be carefully scrutinized and monitored by counsel in order to ensure that deficiency rights are not impaired.

---

230. *Escat v. National Bank of Commerce in New Orleans*, 284 So. 2d 832 (La. App. 4th Cir. 1973).

231. *Id.* at 836.

232. 385 So. 2d 245, 247 (La. 1980).

233. See also *Ford Motor Credit Co. v. Breaux*, 406 So. 2d 313 (La. App. 3d Cir. 1981).

234. La. R.S. 51:1401-:1418 (1987 and Supp. 1990). *General Inv., Inc. v. Thomas*, 400 So. 2d 1081 (La. App. 4th Cir. 1981).

235. *Dixie Fed. Sav. and Loan Ass'n v. Pitre*, 498 So. 2d 112, 114 (La. App. 5th Cir. 1986).

236. *Bank of New Orleans & Trust Co. v. Brule*, 389 So. 2d 1148 (La. App. 4th Cir. 1980).

